Supreme Court, U.S.
FILED
041379 APR 11 2005
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No. 04-

IN THE

Supreme Court of the United States

EDUARDO MORENO LAPARADE, individually and as Executor of THE ESTATE OF MARIO MORENO REYES,

Petitioner,

v.

COLUMBIA PICTURES INDUSTRIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the fugitive disentitlement doctrine applies to strip a litigant of a statutory right to appeal where the district judge issues an arrest warrant for civil contempt precisely to preclude the litigant from obtaining appellate review.

2. Whether a District Court may, consistent with *Hovey v. Elliott*, 167 U.S. 409 (1897), enter a sanction under Fed. R Civ. P. 16(f) of over $27 million because Plaintiff's counsel missed a scheduling conference.

PARTIES TO THE PROCEEDINGS

The only parties to this proceeding are named in the caption.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	ix
Opinions Below	1
Statement of Jurisdiction	1
Relevant Statutory Provisions	1
Statement	2
1. The Parties	4
2. The 1997 Laparade Suit	5
3. Petitioner's Motion to Dismiss for Lack of Subject Matter Jurisdiction	7
4. Respondent's Counterclaim in the 1997 Suit	8
5. The Extraterritorial Injunctions	12
6. The Bench Trial	6

Contents

Page

7. The Arrest Warrant for Failure to Comply with the Permanent Injunction 15

8. The Case Before Judge Tevrizian 16

9. The Appeal 18

Reasons for Granting the Petition 19

1. Application of the Fugitive Disentitlement Doctrine was Inappropriate 1

2. Judge Rea Lacked Subject Matter Jurisdiction 23

3. Entry of Default Judgment Conflicted With *Hovey v. Elliott* 24

Conclusion 26

TABLE OF CITED AUTHORITIES

CASES

Page

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 23

Cavallo, Ruffalo & Fargnoli v. Torres, 1988 U.S. Dist. LEXIS 16881 (C.D. Cal. Dec. 13, 1988) 13

Cliett v. Hammonds, 305 F.2d 565 (5th Cir. 1962) ... 24

Degen v. United States, 517 U.S. 820 (1996) ...21, 22, 23

Devlin v. Scardelletti, 536 U.S. 1 (2002) 3

Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1 (1983) 7

Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567 (2004) 23

Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909) 25

Heyman v. Kline, 456 F.2d 123 (2d Cir. 1972) 24

Hovey v. Elliott, 167 U.S. 409 (1897) 4, 20, 21, 25

Humble Oil Co. v. Copeland, 398 F.2d 364 (4th Cir. 1968) 13

In re Hern Iron Works, 881 F.2d 722 (9th Cir. 1989) .. 24

Cited Authorities

Page

Insurance Company of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) 9

Kontrick v. Ryan, 540 U.S. 443 (2004) 23

Latrobe Steel Co. v. United Steelworkers of America, 545 F.2d 1336 (3d Cir. 1976) 24

Luckett v. Delpark Inc., 270 U.S. 496 (1926) 5

Metropolitan Life Insurance v. Enright, 231 F. Supp. 275 (S.D.. Cal. 1964) 13

Motorola Credit Corp. v. Uzan, 115 Fed. Appx. 473 (2d Cir. Oct. 22, 2004) 20, 22

Muskrat v. United States, 219 U.S. 346 (1911) 14

Royal v. Leading Edge Products, 833 F.2d 1 (1st Cir. 1987) 5

Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999) 23

Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921) 23

Societe Internationale Pour Participations Industrielles et Commerciales, S.A..v. Rogers, 357 U.S. 197 (1958) 25

Subafilms, Ltd. v. MGM-Pathe Committee, 24 F.3d 1088 (9th Cir. 1998) 13, 14

Cited Authorities

Page

United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72 (1988) 3, 22

United States v. $40,877.59 in United States Currency, 32 F.3d 1151 (7th Cir. 1994) 25

United States v. Armour & Co., 402 U.S. 673 (1971) 10

United States v. Cotton, 535 U.S. 625 (2002) 10, 23

Vermont Agency of Natural Resources v. United States, 529 U.S. 765 (2000) 8, 23

Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834) ... 11

STATUTES

17 U.S.C. § 19 (1909, *repealed* 1978) 4

17 U.S.C. § 104A(b) 2, 11, 12, 14, 18

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291, *et seq.* 1

28 U.S.C. § 1335 8

28 U.S.C. § 1338(a) 2, 18

28 U.S.C. § 1367 8

28 U.S.C. § 2201 5

Page

Pub. L. No. 103-465, 108 Stat. 4809 (1994) 19

Pub. L. No. 103-182, 107 Stat. 2057 (1993) 19

RULES

Fed. R. Civ. P. 12(h)(3) 23

Fed. R. Civ. P. 16(f) 2, 4, 17, 24, 25

Fed. R. Civ. P. 60(b) 17, 24

Fed. R. Civ. P. 65 13

OTHER AUTHORITIES

13 *Moore's Federal Practice- Civil* §65.05[1] 12

6 Wright & Miller, *Federal Practice & Procedure* § 1433 8

TABLE OF APPENDICES

Page

Appendix A — Memorandum Of The United States Court Of Appeals For The Ninth Circuit Filed November 5, 2005 ..... 1a

Appendix B — Phase II Bench Trial: Findings Of Fact And Conclusions Of Law Of The United States District Court For The Central District Of California Dated June 7, 2002 ..... 11a

Appendix C — Order Granting Columbia's Motion For Preliminary Injunction Of The United States District Court For The Central District Of California Filed November 20, 2001 ..... 29a

Appendix D — Amended Order Granting Columbia's Motion For Preliminary Injunction Of The United States District Court For The Central District Of California Filed July 31, 2001 ..... 32a

Appendix E — Order Re: Motion For Partial Summary Judgment And Motion To Enjoin Pending Mexican Litigation Of The United States District Court For The Central District Of California Filed May 10, 2000 ..... 45a

Appendix F — Tentative Ruling Of The United States District Court For The Central District Of California Dated July 14, 1997 ..... 58a

Appendix G — Order Of The United States Court Of Appeals For The Ninth Circuit Denying Petition For Rehearing Filed January 11, 2005 ..... 73a

Appendices

Page

Appendix H — Warrant For Arrest From The United States District Court For The Central District Of California Dated July 11, 2003 ..... 76a

Mario Moreno Ivanova and the Estate of Mario Moreno Reyes respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in two consolidated cases, *Eduardo Moreno Laparade v. Columbia Pictures Industries, Inc.*, and *Mario Moreno Ivanova v. Columbia Pictures Industries, Inc.*

OPINIONS BELOW

The opinion of the United States Court of Appeal for the Ninth Circuit (Pet. App. 1-10a) is unpublished. The district courts' memoranda and rulings granting the relief that forms the subject of this petition (Pet. App. B-H) are also unpublished.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on November 5, 2004. Pet. App. 1a-10a. The court of appeals denied rehearing and rehearing en banc on January 11, 2005. Pet. App. 58a-60a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are:

28 U.S.C. § 1291.

> Final decisions of district courts. The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1338(a)

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.

17 U.S.C. § 104A(b)

Ownership of restored copyright. A restored work vests initially in the author or initial rightholder of the work as determined by the law of the source country of the work.

Fed. R. Civ. P. 16(f):

If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

STATEMENT

This case presents important questions involving the power of a federal court, acting without subject matter jurisdiction, to strip a civil defendant of his statutory right to appeal unlawful

decisions by issuing an arrest warrant in order to invoke the fugitive disentitlement doctrine. In *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 77 (1988), this Court held that even a non-party may, on appeal, challenge a civil contempt ruling for lack of subject matter jurisdiction in the underlying litigation, declaring that it is a

> central principle of a free society that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from the very wrong asserted here, the excessive use of judicial power. The courts, no less than the political branches of the government, must respect the limits of their authority.

This principle applies *a fortiorari* where, as here, it is a party appealing, *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

This case presents even more compelling facts than *United States Catholic Conference*: a foreign citizen was involuntarily brought into a civil action in the United States; a trial court, lacking subject matter jurisdiction, proceeded to issue a series of unlawful extraterritorial injunctions and orders with which Petitioner substantially complied; nevertheless, the trial court, *exactly one year after the appeal was filed,* issued an arrest warrant in order to manufacture fugitive status for the express purpose of depriving Petitioner of his right to appeal. The Ninth Circuit dismissed on the fugitive disentitlement ground.

In the ordinary course of litigation, where a party contests non-final rulings, due to the collateral order doctrine the party must suffer a contempt citation and may appeal only after a final judgment is entered. The Ninth Circuit has, however, created a new Catch 22 world for those who have already appealed from a final judgment: where a district court, subsequent to the appeal being filed, issues a civil imprisonment order for the appellant, the appeal will be dismissed on the ground of fugitive disentitlement, thereby denying the appellant the ability to contest the very decision that led to the civil

imprisonment, and even though the arrest warrant cannot itself be contested in the appeal.

Additionally, this case presents the question of whether a federal court may, consistent with *Hovey v. Elliott*, 167 U.S. 409 (1897), enter, without a hearing, a Rule 16(f) sanction against a foreign party in an amount exceeding $27 million, based on trial counsel's failure to attend a scheduling conference.

1. *The Parties*

Petitioner Mario Moreno Ivanova, a Mexican citizen and resident, is the son and the executor of the estate of his late father, Mario Moreno Reyes. In 1940, with the movie *Ahi Esta El Detalle*, Mr. Reyes became an international film star in the Spanish speaking world. Mr. Reyes is best known by his film name "Cantinflas." Mr. Reyes starred in approximately 50 motion pictures. Following *Ahi Esta El Detalle*, Cantinflas became the producer and copyright owner of all his subsequent films. He is regarded as one of Mexico's most important cultural figures, and died in Mexico in 1993.

Respondent Columbia Pictures Industries, Inc. was the long-time distributor of Cantinflas' films, which were in the public domain in the United States for failure to comply with the mandatory affixation of copyright notice provision found in then governing 17 U.S.C. § 19 (1909, *repealed* 1978).

At issue in the courts below were rights in and royalties from the exploitation of 34 of Cantinflas' classic films. Mexico's Instituto del Derecho de Autor (Copyright Office) submitted pre-trial affidavits that Petitioner is the owner of Mexican copyrights. The Mexican government submitted amicus briefs fully supporting Petitioner before the court of appeals and strongly protesting the trial courts' violations of Mexican sovereignty: *all* of the activity that gave rise to the invocation of the fugitive disentitlement doctrine occurred in Mexico and was lawful under Mexican law.

2. *The 1997 Laparade Suit*

This appeal arises out of litigation filed in 1997 by Eduardo Moreno Laparade (Cantinflas' nephew), against Petitioner, Respondent, and others in the United States District Court for the Central District of California. Laparade claimed that he, not Petitioner, owned rights in Cantinflas' films. Laparade's suit was an effort to use the U.S. courts to circumvent an earlier ruling by a Mexican court that Petitioner was the owner of rights in his father's films. The sole competency of the Mexican courts to adjudicate a matter of estate distribution to Mexican citizens of copyrighted works created in Mexico by a Mexican citizen is self-evident.

Laparade alleged that subject matter jurisdiction in U.S. federal court existed on the basis of diversity, the Declaratory Judgment Act (28 U.S.C. § 2201), and a 1994 settlement agreement and Stipulated Judgment entered in response to a 1993 interpleader action brought by Respondent. Columbia alleged in the 1993 interpleader action that, following Cantinflas's death, a dispute existed over entitlement to royalties for the distribution of his films. Columbia's interpleader action did not seek to determine copyright ownership. Even assuming arguendo any role for U.S. courts in this matter, all disputes over royalty distributions arise under state, not federal law, *Luckett v. Delpark Inc.*, 270 U.S. 496 (1926) (patent royalties); *Royal v. Leading Edge Prods.*, 833 F.2d 1, 4 (1st Cir. 1987) (copyright).

In light of the at best limited nature of jurisdiction for its 1993 interpleader, in the 1994 settlement agreement, Respondent acknowledged that Petitioner had agreed to jurisdiction only for the interpleader purpose of the contested distribution of royalties.[1] This understanding was incorporated into the 1994

---

[1] Paragraph 2 of the Settlement Agreement provided:

> Mario Moreno Ivanova . . . hereby appear[s] specially and solely for the limited purpose of giving jurisdiction to this

(Cont'd)

Stipulated Judgment. The Stipulated Judgment decreed that the agreement could not be used as a jurisdictional basis for any future action other than to enforce the specific terms of the Judgment itself. [2]

Laparade's 1997 case was assigned to the same judge who had entered the 1994 Stipulated Judgment, Senior Judge William Rea. As Judge Rea realized, all three of Laparade's grounds for subject matter jurisdiction were fatally flawed. There was no diversity: Laparade and Petitioner are both Mexican citizens. Nor could the 1994 settlement agreement provide a jurisdictional basis for a claim of *rights* in Cantinflas' films: that issue had been decided by the Mexican court. The 1994 Stipulated Judgment provided for retention of jurisdiction only to enforce the royalty distributions, and as noted, issues concerning royalty *distributions* are matter of state, not federal, law. Finally, the Declaratory Judgment Act is a procedural device only, permitting an individual who has a reasonable apprehension of suit to bring the matter before a federal court. The Declaratory Judgment Act does not provide an independent basis for subject matter jurisdiction, *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California,*

(Cont'd)

> Court to enter judgment pursuant to the terms of this stipulation ("the Judgment") and for the enforcement of this stipulation and the Judgment. The parties covenant and agree individually and by their respective attorneys that this special appearance shall not be deemed consent to general jurisdiction by [Ivanova] in this action or any other action, nor a waiver of [Ivanova's] claim of lack of jurisdiction with regard to any other action or proceeding already on file, or which may be filed, in the State of California.

[2] Paragraph 15 of the Stipulated Judgment provided: "The Court will retain jurisdiction over the parties to the Stipulation for Entry of Judgment; Order Thereon, dated [__], for the exclusive purpose of the enforcement of that Stipulation and this Judgment. The Court shall have exclusive jurisdiction to enforce that Stipulation and this Judgment."

463 U.S. 1, 15-16 (1983). There was no independent subject matter jurisdiction ground for Laparade's complaint.

3. *Petitioner's Motion to Dismiss for Lack of Subject Matter Jurisdiction*

Throughout the Laparade litigation, including the appeal to the Ninth Circuit and before this Court, Petitioner has steadfastly and repeatedly challenged subject matter jurisdiction. The lack of subject matter jurisdiction is critical because without it, Judge Rea's subsequent orders and the Ninth Circuit's dismissal of the appeal on the fugitive disentitlement ground must fall.

Petitioner first challenged subject matter jurisdiction in an April 4, 1997 motion to dismiss Laparade's complaint. On July 14, 1997, Judge Rea granted Petitioner's motion, holding with respect to the 1994 Stipulated Judgment that

> The Stipulated Judgment clearly contemplated that Laparade's contractual claim for rights to proceeds from certain Moreno Reyes films would be determined in the Mexican courts, and that whether and to what extent Laparade's claim was deemed valid would determine the distribution of proceeds in the Laparade/Ivanova escrow account. The Judgment reserved jurisdiction by this Court only to determine whether or not such prerequisites – i.e., the final and nonappealable judgment by a Mexican court – had been fulfilled, and to direct and/or approve the subsequent distribution of funds. The judgment clearly did not reserve jurisdiction for this Court to examine the substantive contractual being litigated in the Mexican courts.

Pet. App. 60a.

The Court then addressed its lack of jurisdiction over the complaint:

> Given that the Stipulated Judgment cannot be relied upon as a jurisdictional basis, it is clear that no

> legitimate basis for jurisdiction exists. . . . Ivanova remains a defendant in the action fled by Laparade. As defendant points out, this destroys complete diversity, as there are Mexican defendants on both sides of the case.
>
> The only other jurisdictional basis alleged in plaintiff's complaint is under the Declaratory Judgment Act ... [T]he Declaratory Judgment Act does not provide an independent source of subject matter jurisdiction.

Pet. App. at 67a-68a.

4. *Respondent's Counterclaim in the 1997 Suit*

Respondent Columbia asserted an interpleader action as a counterclaim to Laparade's complaint, joining Petitioner as a defendant. Once plaintiff Laparade's complaint was dismissed for lack of subject matter jurisdiction (as it was), the district court had no power other than to dismiss Columbia's counterclaim, *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 779 (2000), unless the claim was supported by an independent subject matter basis, 6 Wright & Miller, *Federal Practice & Procedure* §1433, at 258. It wasn't.

Columbia did not plead jurisdiction under the Copyright Act, but instead under the Interpleader Act, 28 U.S. § 1335 (or as a fallback under the supplemental jurisdiction, 28 U.S.C. § 1367). There was no genuine interpleader, however, since when the suit was filed, there was no res. The Ninth Circuit, aware of the sham nature of the interpleader, rightly ignored it as a possible basis for jurisdiction. In any event, Columbia's counterclaim provided no more a basis for the exercise of subject matter jurisdiction over Columbia's *ownership* claims than did Laparade's dismissed complaint since Columbia, like Laparade, pled jurisdiction under the 1994 agreement; that agreement concerned royalties, not ownership. Even if the parties had wished to consent to subject matter jurisdiction in order to have Judge Rea decide the issue, they couldn't. As this Court held in

Insurance Company of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982):

> Subject-matter jurisdiction, then, is an Art. III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. Certain legal consequences directly follow from this. For example, no action of the parties can confer subject-matter jurisdiction upon a federal court.

A fortiorari where, as here, one party strongly contests subject matter jurisdiction.

Despite the trial court's complete lack of subject matter jurisdiction, and contrary to the 1994 Stipulated Judgment, Judge Rea denied Petitioner's motion to dismiss Respondent's counterclaim.[3] Judge Rea asserted jurisdiction over Columbia's counterclaim based on the reservation of jurisdiction found in the 1994 Stipulated Judgment that, inconsistently, he had just construed as requiring dismissal of plaintiff's complaint. Six pages earlier in the same opinion (quoted in relevant part above), Judge Rea had construed the Stipulated Judgment as vesting jurisdiction "only to determine whether or not such prerequisites – i.e., the final and nonappealable judgment by a Mexican court – had been fulfilled, and to direct and/or approve the subsequent distribution of funds," Pet. App. 60a. What was sauce for the Laparade goose should have been sauce for the Columbia gander. Yet, Judge Rea then held that he possessed subject matter jurisdiction over Columbia's counterclaim because

> the Stipulated Judgment was at least arguably premised upon the notion that Columbia owned the rights to the

[3] In 2000, Petitioner renewed its motion to dismiss Columbia's counterclaim for lack of subject matter jurisdiction. Judge Rea denied this motion on March 27, 2000. In an order dated April 11, 2000, Judge Rea barred Petitioner from raising lack of subject matter jurisdiction in the future.

> subject films, with the sole question for this Court's determination how much and to whom past, present and future royalties were owed by Columbia. At the very least, Columbia appears to be correct in asserting that, if newly raised claims to complete film ownership were to be vindicated, it could invalidate this Court's allocation of future royalties by Columbia in the Stipulated Judgment.

Pet. App. 70a.

This Court has held in the analogous situation of a consent decree that the decree "must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it," *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971). Judge Rea's bootstrapped use of "*newly* raised claims" demonstrates that the 1994 agreement did not encompass such claims – otherwise the claims wouldn't be "new." The claims advanced by Columbia in its 1997 counterclaim were not only new temporally, they were new in a subject matter jurisdictional sense: the 1994 agreement dealt with distribution of royalties; the 1997 counterclaim dealt with worldwide ownership of the films.[4] "Arguable premises based on notions" are never an adequate basis for subject matter

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[4] Although Columbia and Judge Rea were in the habit of referring to these rights euphemistically as "film rights," copyright rights is what they were: the exclusive rights to copy, distribute, and publicly perform: that is what Judge Rea enjoined Petitioner from doing and that is what Petitioner was held in contempt for doing. As noted in the second paragraph immediately below, Columbia made a last-ditch effort in 2002 to have Judge Rea rewrite his Phase II decision to assert he had "impliedly" ruled under the Copyright Act. While Judge Rea rejected this request, the request shows Columbia knew exactly the nature of the rights it had been awarded, copyright rights. Unfortunately, there was no subject matter jurisdiction for the award of them.

jurisdiction, and certainly not where, as here, they are not based on any subject matter jurisdictional ground actually pled by the parties or available to the court.

Wholly aside from the text of the settlement agreement, there is another reason subject matter jurisdiction based on the 1994 agreement was lacking over Columbia's ownership claims: Cantinflas' films were in the public domain in the United States until January 1, 1995 (when they were restored as part of 17 U.S.C. § 104A); thus, there were no U.S. ownership claims in 1994. Accordingly, as a matter of law, the 1994 settlement agreement and Stipulated Judgment could not be even "arguably premised upon the notion" that Columbia owned the rights in the films since they were in the public domain in the United States at that time.

Columbia was so hapless jurisdictionally that even when U.S. copyright in Cantinflas' films was subsequently restored on January 1, 1995. Columbia did not, in its 1997 counterclaim, allege jurisdiction under Section 104A.[5] Columbia was quite aware of restored ownership under that provision because, on December 26, 1996, *prior* to filing its counterclaim, pursuant to Section 104A, it had filed with the U.S. Copyright Office twenty "Notices of Intent to Enforce a Restored Copyright" asserting restored rights in Cantinflas' films.

But Columbia did not realize the fatal lack of subject matter jurisdiction in its 1997 counterclaim until 2002, *after* the court had rendered its decision. In an after-the-fact attempt to get the court to rewrite its decision to cure the lack of subject matter jurisdiction, Columbia argued before Judge Rea that he had "impliedly" based his ownership ruling on Section 104A. Judge

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[5] One reason Columbia may have deliberately chose not to allege ownership based on Section 104A is that the provision clearly declares that ownership is to be determined by Mexican law, and Columbia was successfully attempting an end-run around the provision by having Judge Rea create a sui generis, common law copyright, contrary to this Court's decision in *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

Rea rejected this effort in an October 29, 2002 ruling declaring the trial was over:

> [Columbia] argues that implicit in its decision, the Court ruled that it is entitled to any restoration rights. The Court, however, does not rule implicitly. The Court made no findings with respect to copyright in the second phase. . . . The decision is an interpretation of contracts as to what rights they attempt to grant, it does not in any way attempt to interpret the Copyright Act. The Court has not decided that Columbia is entitled to any restoration rights under § 104A and it will not.

But without jurisdiction under Section 104A, there was no subject matter jurisdictional basis for Columbia's ownership claims or for the relief Judge Rea granted, as Columbia realized too late. Everything that occurred after the trial court's illicit assumption of subject matter jurisdiction, including the issuance of extraterritorial injunctions, the decisions on the merits, the contempt citation, the arrest warrant, and the preclusion of the appeal based on the fugitive disentitlement doctrine must fall due to the lack of subject matter jurisdiction.

5. *The Extraterritorial Injunctions*

Oddly, the trial court's lack of subject matter jurisdiction seems to have emboldened it to go on an extraterritorial spree. First, on May 10, 2000, Judge Rea enjoined, over their objections, two Mexican citizens, Petitioner and Laparade, from litigating *in Mexico* claims under *Mexican* law. Pet. App. 45a-57a. Judge Rea's ruling was based not on subject matter jurisdiction – none existed – but on personal jurisdiction. That was grievous error. To issue injunctive relief, the court must have subject matter jurisdiction over the dispute *and* there must be a substantive provision of law that authorizes the issuance of the injunction. 13 *Moore's Federal Practice- Civil* §65.05[1]. The May 10, 2000 injunction further represented a reversal of the court's previous rulings that the question of ownership was to be decided by the Mexican courts. By effectively divesting

the Mexican courts of the dispute, Judge Rea exceeded his powers and violated Mexican sovereignty. Not surprisingly, the Mexican government has protested Judge Rea's rulings in amicus briefs submitted on Petitioner's behalf.

Next, on July 31, 2001, a very long four years and three months after the filing of Columbia's counterclaim, Judge Rea preliminarily enjoined Petitioner from exploiting *anywhere in the world* 8 of his father's films, without findings, without a bond (contrary to Fed. R. Civ. P. (c) and (d)) and without any statutory basis authorizing the injunction. Pet. App. 32a-44a. As to these 8 films, Columbia had asserted merely a right of first refusal; a right of first refusal is not an ownership right, *Cavallo, Ruffalo & Fargnoli v. Torres*, 1988 U.S. Dist. LEXIS 16881 (C.D. Cal. Dec. 13, 1988). The alleged right of first refusal was, of necessity, based on a purported contract. But Columbia had not brought a contract action; it had brought an interpleader action for distribution of royalties. Interpleader actions are based on *personal* jurisdiction, *Humble Oil Co. v. Copeland*, 398 F.2d 364, 368 (4th Cir. 1968); *Metropolitan Life Insurance v. Enright*, 231 F. Supp. 275, 278 (S.D. Cal. 1964). There is no basis in the Interpleader Act, contract law, or even the Copyright Act for enjoining extraterritorially a Mexican citizen from distributing films in Mexico films, *Subafilms, Ltd. v. MGM-Pathe Comm.*, 24 F.3d 1088, 1098 (9th Cir. 1998) (en banc), and certainly not where, as here, Petitioner's acts in Mexico were lawful

Judge Rea issued a third extraterritorial injunction on November 20, 2001 (four years and seven months after the counterclaim was filed), preliminarily barring Petitioner from distributing the remaining 26 of his father's films *in Mexico and throughout the world*, again without findings, without a bond (again contrary to Fed. R. Civ. P. 65(c) and (d)), and again without any statutory basis authorizing the injunction. Pet. App. 29a-31a.

6. *The Bench Trial*

After a bench trial, on June 11, 2002, the trial court issued Findings of Fact and Conclusions of Law in what was known as Phase II of the trial. Pet. App.11a-28a. The gist of this order was that Columbia was the owner of worldwide "Film Rights" (a synonym for copyright) in the 26 films subject to the November 20, 2001 preliminary injunction. Columbia had, during the course of the trial disclaimed any rights in the remaining 8 films (those subject to the July 31, 2001 preliminary injunction), yet the Court found that Petitioner had not "proved" it owned rights in these films, Pet. App. 26a-27a. This ruling was contrary to the decisions of the Mexican courts, and to 17 U.S.C. § 104A, which requires application of Mexican law to determine ownership of restored U.S. copyright rights. As to the 8 films, Columbia abandoned even a claim of a right of first refusal. This deprived the court of a case or controversy with respect to these films, the most basic of Article III subject matter requirements, *Muskrat v. United States*, 219 U.S. 346, 356, 359 (1911).

Despite Columbia's abandonment of any claim in 8 of the films and the consequent lack of a case or controversy, the district court permanently enjoined Petitioner, throughout the world, from distributing all 34 films. The absence of any contractual or ownership interest by Columbia in the 8 films was fatal to this injunction: wholly aside from the lack of a case or controversy over the 8 films, where neither party owns an interest in intellectual property, neither party may obtain relief against the other for the distribution of that property. As to the 8 films for which Columbia disclaimed any interest, there is no conceivable subject matter basis for the trial court enjoining Petitioner from distributing them. As to the remaining 26 films, even if Columbia had pled the Copyright Act as the basis for its claim in all 34 films, that Act does not authorize extraterritorial injunctions, *Subafilms, Ltd. v. MGM-Pathe Comm.*, 24 F.3d 1088, 1098 (9th Cir. 1998) (en banc). Nor could the injunction

be justified under the jurisdictional ground that Columbia actually pled, the Interpleader Act.

Judge Rea further ordered Petitioner to turn-over the invaluable, flammable silver nitrate stock film negatives for the movies, despite the fact that Columbia had not pled a cause of action for ownership thereof, and despite the fact that the negatives had been created in Mexico and had been stored in that country for decades by Petitioner's father in special vaults.[6] The turn-over order was also a deep affront to Mexican sovereignty since it compelled a Mexican citizen to turn over property that was created in Mexico and which had resided in Mexico from its inception. That the property constituted an important part of the cultural patrimony of Mexico makes the affront all the greater. On January 28, 2003 the court entered final judgment.

7. *The Arrest Warrant for Failure to Comply with the Permanent Injunction*

Even before the final judgment had been entered, Columbia laid the ground work for issuance of an arrest warrant and use of the fugitive disentitlement doctrine in order to insulate Judge Rea's unlawful orders. When Petitioner refused to comply with the turn-over order and negotiated a distribution agreement for Mexican distribution of the films, on August 20, 20002, Judge Rea held Ivanova in civil contempt. Pet. App. G. Ivanova was held in further contempt on March 31, 2003 and April 28, 2003. An arrest warrant (civil imprisonment order) was issued on July 11, 2003, Pet. App. H, exactly one year after the notice of appeal was filed.

Judge Rea was well aware that Petitioner, a Mexican citizen and resident, would not comply with the arrest warrant: "[i]t is the case that Ivanova lives in Mexico and is not likely to present

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[6] One reason for Petitioner 's reluctance to turn over the negatives was earlier conduct by Judge Rea. When Petitioner had brought a few of the negatives for use as evidence, Judge Rea ordered them confiscated.

himself to a U.S. Marshal for arrest. . . ." Pet. App. G The arrest warrant was nevertheless issued in order (1) to prevent Ivanova from traveling to the United States; (2) to cause the Ninth Circuit to dismiss the then-pending appeal from the court's rulings – the same ones that led to the contempt citations ("[I]f Ivanova refuses to present himself for incarceration, under the 'fugitive disentitlement doctrine' the Ninth Circuit may dismiss the now-pending appeal from this Court's Judgment") (Pet. App. G), and (3) to prevent Ivanova from participating in a lawsuit he had filed against Respondent claiming infringement of his Mexican copyrights. Pet. App. G. The trial court's actions – sanctioned by the court of appeals – represent a serious impairment on the sovereignty of all foreign countries whose citizens are interpled as defendants in cases in U.S. courts: all that a trial court need do to make unlawful rulings appeal proof is to issue an arrest warrant, secure in the knowledge that foreign citizens will not present themselves in the United States for incarceration; due to this manufactured fugitive status, the trial court will know defendant's appeal will be dismissed, and its unlawful rulings thereby made unreviewable. That is exactly what happened here.

The Ninth Circuit's dismissal also creates a Catch 22 world for those who have already appealed from a final judgment: where a district court, subsequent to the appeal being filed, issues a civil imprisonment order for the appellant, the appeal will be dismissed on the ground of fugitive disentitlement, thereby denying the appellant the ability to contest the very decision that led to the civil imprisonment, and even though the arrest warrant cannot itself be contested in the appeal.

8. *The Case Before Judge Tevrizian*

Although Judge Rea determined that Columbia was the owner of "worldwide film rights," he asserted he was not ruling on Petitioner's right to the Mexican copyrights. As the adjudged owner of Mexican copyright rights by the Mexican court, Petitioner filed a transitory tort action in the Central District of

California alleging infringement by Columbia in Mexico. Columbia asserted various counterclaims. The case was assigned to Judge Tevrizian. When Petitioner's trial counsel missed a scheduling conference, Judge Tevrizian on the spot, without notice or a hearing, entered judgment, as a sanction pursuant to Fed. R. Civ. P. 16(f) against Petitioner, and for Columbia on its counterclaims, awarding Columbia Petitioner's Mexican copyrights, awarding to Columbia a $25 million judgment, an escrow account of $2.1 million, $461,500 in damages, and injunctive relief that included an order for Petitioner to withdraw copyright registrations it had obtained in Mexico and the United States.[7] Judge Tevrizian then denied Petitioner's Fed. R. Civ. P. 60(b) motion for relief from the sanction.

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[7] THE COURT: All right. The Plaintiff is not here. And this is a regularly scheduled conference. There is a history of contempt that has been employed by Judge Rea with regard to the Plaintiff's counsel in this case. He has not appeared today. So what I am going to do is, as a sanction for not appearing today, I'm going to grant judgment in favor of Columbia on the Mexican copyright claims; finding the Mexican copyright – the Plaintiff has no interest in those claims.

Did you seek to have an – the copyright claims affirmative[ly] stated in favor of Columbia?

MR. TASHMAN (Columbia's counsel): Yes, we did, you[r] Honor.

THE COURT: All right. The[n] I'll assert – affirmatively assert the owner of the copyright to the Mexican – the Mexican copyright in, I believe there's 7 films?

MR. TASHMAN: I think, you[r] Honor, that there are 32 films in which Columbia claims ownership of the Mexican copyrights.

. . .

MR. TASHMAN: Your Honor, in addition to the Mexican copyrights claims, Columbia has asserted certain related claims

(Cont'd)

When Petitioner failed to withdraw his Mexican copyright registrations, Judge Tevrizian issued an arrest warrant expressly "to allow Columbia to assert the fugitive disentitlement doctrine with respect to the appeal," which had, by then, been briefed. This too created a Catch 22 situation for Ivanova: his appeal faced dismissal under the fugitive disentitlement doctrine due to the issuance of an arrest warrant after the appeal was taken, even though the arrest warrant was not part of the appeal.

9. *The Appeal*

The Ninth Circuit's November 4, 2005 opinion mistakenly assumed that Judge Rea (and therefore it) possessed subject matter jurisdiction under the Copyright Act: "The district court had subject matter jurisdiction pursuant to 17 U.S.C. §104A and 28 U.S.C. § 1338(a)." Pet. App. 7a. As noted above, Judge Rea had rejected Columbia's argument that he had even impliedly ruled pursuant to these provisions. Nevertheless, the court of appeals followed both Judge Rea and Judge Tevrizian's open suggestions that their orders not be reviewed pursuant to the fugitive disentitlement doctrine, and dismissed the appeal on that ground. (Pet. App. 7a-8a). Petitioner timely sought rehearing and rehearing en banc which was denied. (Pet. App. 58a-60a).

This petition followed.

(Cont'd)

> in terms of tortuous interference and [to] quiet title. We would ask that the Court also enter judgment in Columbia's favor on those claims as well.
>
> . . .
>
> THE COURT: You'll prepare a judgment for my signature.
>
> . . .
>
> THE COURT: . . . All right. Plaintiff's counsel failed to appear in this case. I will order judgment as set forth, and that is that Columbia Pictures is entitled to recover on its counter-claim[s].

REASONS FOR GRANTING THE PETITION

This case presents questions of profound importance that merit certiorari: the trial courts' actions in this case – sanctioned by the court of appeals – represent a grave threat to the integrity of the judicial process: in order to strip a civil litigant of his right to appeal, the trial courts issued arrest warrants, after the appeals had been filed, knowing that Petitioner, a foreign citizen would not present himself for incarceration. The purpose of the arrest warrants was, openly, to obtain dismissal of *pending* appeals by resort to the fugitive disentitlement doctrine. Moreover, since the arrest warrants were issued after the appeal was filed, they were not a part of the appeal even though they resulted in dismissal of it.

This Court has permitted use of the fugitive disentitlement doctrine only in narrow circumstances, and never where, as here, the fugitive status is deliberately manufactured by the trial court in order to cause the dismissal of a pending appeal.

The *ultra vires* conduct by Judge Rea – sanctioned by the Ninth Circuit – also raises important international issues: the extraterritorial injunctions entered below barred Petitioner, a Mexican citizen, from litigating issues of Mexican law against another Mexican citizen in the courts of Mexico, and from engaging in acts that were lawful in Mexico. By so doing, the trial court stripped Petitioner of copyrights that vested under Mexican law as well as U.S. copyrights the Mexican government had negotiated for and obtained in the NAFTA Trade Agreement (Pub. L. No. No. 103-182, 107 Stat. 2057 (1993)) and in the 1994 GATT Trade Agreement (Pub. L. No. 103-465, 108 Stat. 4809 (1994)). As a result, the United States has become needlessly enmeshed in an international trade dispute with the Government of Mexico. Unless reversed by this Court, the lower courts' actions may lead to the filing of a complaint by the Mexican government against the United States with the World Trade Organization.

Moreover, the Ninth Circuit's decision conflicts with the Second Circuit's decision in *Motorola Credit Corp. v. Uzan*, 115 Fed. Appx. 473 (2d Cir. Oct. 22, 2004). *Motorola* refused to apply the fugitive disentitlement doctrine on similar facts. The contemnors in *Motorola Credit Corp.* were foreign citizens, who

> have resided in a foreign country all along, and were "present" in the Southern District in the barest sense necessary to support personal jurisdiction ... [W]e believe that a nonresident who appeals an adverse judgment is in a different position than the typical fugitive who leaves a jurisdiction for the sole purpose if evading a judgment.

Id. at 475. Additionally as here, the Second Circuit observed that the "appeal principally involves discrete challenges to the District Court's subject matter jurisdiction that can be adjudicated without the appellants being present either before the District Court or before this Court." *Id.*

Finally, the entry of a Rule 16(f) sanction of over $27 million against a party for it's counsel's for failure to attend a scheduling conference conflicts with this Court's opinion in *Hovey v. Elliott*, 167 U.S. 409 (1897).

1. Application of the Fugitive Disentitlement Doctrine was Inappropriate

In both suits, the fugitive disentitlement doctrine was utilized in a manner never permitted to this Court, and which cannot withstand constitutional scrutiny: both arrest warrants were issued during the pendency of the appeal and for the express purpose of invoking the doctrine in order to cause Petitioner's appeal to be dismissed. In the case before Judge Rea, the arrest warrant was issued on July 11, 2003, exactly one year after Petitioner had filed its appeal and approximately five months after Petitioner had filed its opening brief. In the case before Judge Tevrizian, the arrest warrant was issued on June 7, 2004.

Petitioner's opening brief had been filed on February 6, 2004. Respondent's reply brief had been filed on April 5, 2004. In both cases the arrest warrants were issued *after* the appeal had been submitted, they were not, themselves, part of the appeal, yet their existence – brought to the circuit's attention by Respondent – acted to strip Petitioner of his right to appeal from the very decisions that led to the warrants being issued.

As a result of Judge Rea's lack of subject matter jurisdiction and Judge Tevrizian's lack of authority to order withdrawal of Petitioner's Mexican copyright registrations, application of the fugitive disentitlement doctrine was wrong as a matter of law: no valid arrest warrant can be issued for violating an invalid contempt order issued for failure to comply with an invalid injunction.

In *Degen v. United States*, 517 U.S. 820, 828 (1996) – the last time the fugitive disentitlement doctrine was reviewed by this Court – it was held: "The right of a citizen to defend his property against attack in a court is corollary to the plaintiff's right to sue there. . . . For this reason we have held it unconstitutional to use disentitlement similar to this . . . for contempt of court, *Hovey v. Elliott*, 167 U.S. 409, 413-414 (1897)."

The considerations that led the Court in *Degen* to grant certiorari – misuse of judicial power – exist even more strongly in this case. In the case before Judge Rea, Ivanova, a foreign citizen, had been involuntarily interpled. Unlike *Degen*, the fugitive disentitlement doctrine was not invoked against a criminal defendant who fled the jurisdiction after which he appealed a related civil forfeiture action brought by the Government; rather, the fugitive disentitlement was concocted by Columbia to preclude Petitioner's *pending* appeal from clearly invalid extraterritorial relief issued without subject matter jurisdiction. Indeed, Petitioner was not even a fugitive: he had resided the entire time in Mexico, and was brought into the 1994 and 1997 actions by *others*, first by Respondent, and then

by Laparade. As the Second Circuit held in *Motorola Credit Corp. v. Uzan*, 115 Fed. Appx. 473, 475 (2d Cir. Oct. 22, 2004): "[W]e believe that a nonresident who appeals an adverse judgment is in a different position than the typical fugitive who leaves a jurisdiction for the sole purpose if evading a judgment."

In the case before Judge Tevrizian, the fugitive disentitlement doctrine was used to preclude a pending appeal from a $27 million judgment entered without a hearing for failure to attend a scheduling conference. Use of the fugitive disentitlement for the express purpose of insulating from appellate review misuses of judicial power is itself a misuse of judicial power and cannot be countenanced.

In *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 77 (1988), in which this Court held that even a non-party may challenge a civil contempt ruling for lack of subject matter jurisdiction in the underlying litigation, declaring that it is a "central principle of a free society that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from the very wrong asserted here, the excessive use of judicial power. The courts, no less than the political branches of the government, must respect the limits of their authority." [8]

In *Degen* this Court noted the limited circumstances in which the fugitive disentitlement doctrine could be applied and the adverse consequences that flowed when, as here, it is used inappropriately:

> [T]he sanction of disentitlement is most severe and so could disserve the dignitary purposes for which it is invoked. The dignity of a court derives from the respect accorded its judgments. That respect is eroded, not enhanced, by too free a recourse to rules foreclosing consideration of claims on the merits.

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[8] The contempt finding in that case had been issued for failure to comply with a subpoena duces tecum.

517 U.S. at 828. The indefensible merits of the rulings were, in these cases, precisely what the trial courts wished to insulate from appeal by their manufactured creation of the fugitive disentitlement doctrine. This Court has evidenced increasing concern over the use of the fugitive disentitlement doctrine and has barred its use in cases with far, far less compelling circumstances. If the use of the doctrine is permitted to stand in these cases, trial courts will have a roadmap for the most egregious abuses of power conceivable.

2. *Judge Rea Lacked Subject Matter Jurisdiction*

In *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 778-779 (2000), this Court held: "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is of announcing that fact and dismissing the case. . . ." *See also United States v. Cotton*, 535 U.S. 625, 630 (2002); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999). The lack of subject matter goes directly to the heart of the federal court's limited jurisdiction and for this reason the courts are under an unflagging obligation to ensure that they possess it. As a result, the lack of subject matter jurisdiction may be raised at any time and cannot be waived, FRCP 12(h)(3) ("Whether it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."); *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567 (2004); *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004) ("A litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance"); *United States v. Cotton*, 535 U.S. 625, 630 (2002) ("subject matter jurisdiction ... involves a court's power to hear a case, [and] can never be forfeited or waived. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in [the] district court"); *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). Indeed, in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921), this Court raised the issue *sua sponte*.

For the reasons detailed above, there is no doubt Judge Rea lacked subject matter jurisdiction over the 1997 action. Where the court lacks subject matter jurisdiction, its orders are void ab initio and may be ignored without fear of penalty. Lower courts have held that the invalidity of the underlying order is always a defense to a civil contempt charge. *See, e.g.*, *Heyman v. Kline*, 456 F.2d 123, 131 (2d Cir. 1972); *Latrobe Steel Co. v. United Steelworkers of America*, 545 F.2d 1336, 1347 (3d Cir. 1976); *Cliett v .Hammonds*, 305 F.2d 565, 570 (5th Cir. 1962); *In re Hern Iron Works*, 881 F.2d 722, 726 n.11 (9th Cir. 1989).

Judge Rea engaged in repeated, shocking abuses of power, enjoining Mexican citizens from litigating issues of Mexican law in Mexican courts, issuing extraterritorial injunctions, and ordering a son to turn over to an American corporation invaluable film negatives that his father had carefully stored in Mexico for years – all with a complete lack of subject matter jurisdiction. In the case before Judge Tevrizian, while the court had subject matter jurisdiction over the type of dispute, it lacked jurisdiction to order Plaintiff extraterritorially withdraw Mexican copyright registrations – tellingly, the Court did not cite to any authority either. Accordingly, the issuance of an arrest warrant for failure to comply with the invalid injunction was void.

3. *Entry of Default Judgment Conflicted With Hovey v. Elliott*

Certiorari is also required to correct a second abuse of process, the entry of a Rule 16(f) sanction in Judge Tevrizian's case. After Petitioner's counsel missed a single scheduling conference, Judge Tevrizian, without a hearing, entered on the spot as a sanction under Fed. R. Civ. P. 16(f) judgment against Petitioner on his claims and for Defendant on its counterclaims, in an amount that exceeded $27 million. The court then denied Petitioner's Rule 60(b) motion. The court next purposefully insulated itself from appellate review under the fugitive disentitlement doctrine, by issuing an arrest warrant for

Petitioner after Petitioner failed to withdraw his Mexican copyright registrations, and *after* the appeal was pending.

The sanctions issued by Judge Tevrizian under Rule 16(f) cannot conceivably be deemed an order that is, within the rule itself "just." The sanction was entered not against the attorney who missed the conference, but against a foreign party. A $27 million sanction in such a circumstance is also contrary to this Court's decision in *Hovey v. Elliott*, 167 U.S. 409 (1897). *Hovey* held that

> [t]o say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.

Id. at 414.[9]

Citing *Hovey*, the Seventh Circuit has written "The courts have a duty to render just decisions that are in accordance with the law, and without a fair hearing, that cannot be done. Though individuals may act disrespectfully to the court, the court must nonetheless act justly." *United States v. $40,877.59 in United States Currency*, 32 F.3d 1151, 1157 (7th Cir. 1994). In this case, plaintiff's counsel did not act disrespectfully. Failure to attend a scheduling conference should not be condoned, but neither can it form the basis for a sanction that includes an award of substantive rights worth in excess of $27 million. Frequently, trial courts schedule over a dozen very brief appearances for the same time period, known to practicing lawyers as "cattle calls." The failure of one party to show up works at best only a

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[9] Unlike *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 349-354 (1909) and *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 206-212 (1958), there is no allegation Petitioner failed to produce documents.

modest annoyance to the court. A modest fine would get the attention of counsel and ensure future compliance, for even modest fines will eventually be reported to malpractice insurance carriers and bar associations.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED NOVEMBER 5, 2005

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 02-56222

D.C. No. CV-97-00615-WJR

EDUARDO MORENO LAPARADE,

Plaintiff-counter-defendant,

v.

MARIO MORENO IVANOVA, an individual & as Executor of the Estate of Mario Moreno Reyes;

Defendant-cross-defendant-Appellant,

COLUMBIA PICTURES INDUSTRIES, INC., a California corporation,

Defendant-counter-claimant-cross-claimant-Appellee.

Appendix A

No. 03-55431

D.C. No. CV-97-00615-WJR

EDUARDO MORENO LAPARADE,

Plaintiff,

v.

COLUMBIA PICTURES INDUSTRIES, INC., a California corporation;

Defendant-Appellant,

MARIO MORENO IVANOVA, an individual and as executor of the estate of Mario Moreno Reyes; MARIO MORENO REYES,

Defendants-Appellees.

No. 03-56207

D.C. No. CV-03-01033-DT

MARIO MORENO IVANOVA; ESTATE OF MARIO MORENO REYES (A/K/A CANTINFLAS);

Plaintiffs-Appellants,

TIMOTHY CHARLES RILEY, Esq.,

Appellant,

Appendix A

v.

COLUMBIA PICTURES INDUSTRIES, INC.,
a Delaware Corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
William J. Rea and Dickran Tevizian,
District Judges, Presiding

Argued and Submitted September 13, 2004
Pasadena, California

Before: THOMPSON, SILVERMAN, and WARDLAW, Circuit Judges.

MEMORANDUM*

These consolidated appeals arise from a bench trial before the Hon. William J. Rea and subsequent rulings by the Hon. Dickran Tevrizian. We have jurisdiction under 28 U.S.C. § 1291.

The appeals involve a dispute between Mario Moreno Ivanova, individually and as Executor of the Estate of Mario Moreno Reyes ("Ivanova") and Columbia Pictures Industries ("Columbia") over the rights to Spanish language motion

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

pictures starring Ivanova's deceased father, Mario Moreno Reyes, a/k/a "Cantinflas." Columbia's and Ivanova's competing claims to ownership of the worldwide intellectual property rights and related rights in Cantinflas motion pictures were litigated before District Judge Rea in a three-phase bench trial. *(Eduardo Moreno Laparde v. Columbia Pictures Industries, Inc., et al.*, Case No. CV 97-0615 WJR (CTx)).

After conducting the second phase of the trial, the court permanently enjoined Ivanova from licensing, distributing, marketing or otherwise exploiting or benefitting from 34 Cantinflas motion pictures. In violation of this injunction, Ivanova licensed certain motion pictures for DVD release and refused to turn over the film elements as ordered by the court. The court held Ivanova in contempt and ordered him to appear and pay daily fines.[1] Ivanova failed to do so and the court issued a warrant for his arrest. Ivanova has not surrendered to the court nor has he presented himself for arrest.

Within weeks of the entry of judgment in the trial before Judge Rea, Ivanova filed a "new" action against Columbia (*Ivanova v. Columbia Pictures*, Central District Case No. CV 03-1033 DTT (CWx)), which was assigned to the Hon. Dickran Tevrizian. In this "new" action, Columbia filed counterclaims and a motion for sanctions under Rule 11, arguing that Ivanova's claims were barred by the judgment

1. Prior to the entry of judgment, Ivanova was also found in contempt for disobeying court orders by litigating claims in Mexico, refusing to honor Columbia's refusal rights, and negotiating for distribution of the motion pictures.

previously entered by Judge Rea, and were also barred by a 1994 stipulated judgment.

In an order filed June 9, 2003, Judge Tevrizian determined that the bulk of Ivanova's claims were indeed barred, and struck those claims. Judge Tevrizian awarded Rule 11 sanctions in favor of Columbia and against Ivanova and his counsel for having filed the barred claims. The sanctions were in the sums of $38,651.75 for attorney fees and $857.52 for costs. In determining the amount of the attorney fees award, the court reduced the hourly rates claimed by Columbia's attorneys, and reduced the number of billed hours by 50%.

Thereafter, Ivanova's counsel failed to appear at a scheduling conference to deal with the copyright claims that remained in the case. As a sanction, Judge Tevrizian ordered judgment entered against Ivanova on those remaining claims. The court also ordered judgment entered in favor of Columbia on its counterclaims. Ivanova moved for relief under Federal Rule of Civil Procedure 60(b), arguing that counsel's failure to attend the scheduling conference was due to excusable neglect. The court denied the motion.

The final judgment entered by Judge Tevrizian contained, *inter alia,* a permanent injunction which provided that "Ivanova shall immediately withdraw and/or cause to be withdrawn any registrations or filings whereby the Estate claims ownership of any rights, including copyrights, in any of the 34 Pictures." Ivanova's requests, filed in the district court and in this court, for a stay of the injunction were denied.

Ivanova failed to comply with the injunction issued by Judge Tevrizian. He refused to withdraw the registrations by which he claimed ownership of the 34 Cantinflas motion pictures and he notified the court that he would not withdraw the Mexican copyrights.[2] As a result, he was held in contempt by Judge Tevrizian and a warrant was issued for his arrest. Consistent with his response to the arrest warrant issued by Judge Rea, Ivanova failed to surrender or present himself for arrest pursuant to the warrant issued by Judge Tevrizian.

Ivanova appeals Judge Rea's judgment on three grounds (Case No. 02-56222). First, he contends that the district court lacked personal and subject matter jurisdiction. Second, he argues the district court erred in limiting phase two of the trial to U.S. contract law. Third, he argues the district court's extraterritorial injunction was an abuse of discretion. In Case No. 03-56207, Ivanova and his attorney each appeals Judge Tevrizian's Rule 11 sanction order; Ivanova also appeals the judgment.

In Case No. 03-55431, Columbia appeals Judge Rea's failure to order disgorgement of money Ivanova received from licensing Cantinflas motion pictures in Mexico.

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2. Ivanova acknowledges that he has distributed 8 Pictures on DVD in Mexico in violation of the district court's order. "The Estate informed the court that it believed the injunction regarding the 8 Pictures—issued on behalf of no one—was issued without a legitimate basis for jurisdiction. The Estate informed the court that, in order to survive, it was going to violate the order. . . ."

Appendix A

A. Jurisdiction

The district court had subject matter jurisdiction pursuant to 17 U.S.C. § 104A and 28 U.S.C. § 1338(a). Personal jurisdiction existed over Ivanova in the case before Judge Tevrizian because Ivanova was the plaintiff in that case. In the case before Judge Rea, personal jurisdiction existed over Ivanova because he made a general appearance by actively participating in the trial. *Hilao v. Estate of Marcos,* 95 F.3d 848, 854 (9th Cir.1996) ("A general appearance, of course, subjects the party who appears to the personal jurisdiction of the court."). Ivanova called witnesses, adduced evidence probative of the merits, and made numerous motions on the merits including a motion for summary judgment.

B. Fugitive Disentitlement

Columbia argues that Ivanova's appeals of Judge Rea's judgment in Case No. 02-56222, and of Judge Tevrizian's sanctions order and judgment in Case No. 03-56207, should be dismissed under the fugitive disentitlement doctrine. We agree. Under that doctrine, a court may dismiss a civil appeal where the party seeking relief is a fugitive from justice. *See, e.g., United States v. Van Cauwenberghe,* 934 F.2d 1048, 1054 (9th Cir.1991); *Conforte v. Comm'r,* 692 F.2d 587, 589-90 (9th Cir.1982).

Ivanova has refused to abide by the district court's orders, and has refused to surrender to the warrants issued for his arrest. He is a fugitive from justice. Accordingly, we dismiss Ivanova's appeals in Case Nos. 02-56222 and 03-56207. Because there is an identity of interest between Ivanova and

the Estate of Mario Moreno Reyes (Ivanova is the executor of the Estate and claims to be the sole heir), the Estate must share the same fate. We therefore dismiss the Estate's appeals as well.

C. Rule 11 Sanctions

Ivanova is precluded by the fugitive disentitlement doctrine from challenging Judge Tevrizian's Rule 11 sanctions imposed against him. Ivanova's counsel is not so precluded, but we affirm the sanctions order against him on the merits. The contract claims resolved by Judge Rea determined that Columbia owned all of the right, title and interest in 28 of the Cantinflas motion pictures. This foreclosed a new attempt to obtain the same rights in the guise of copyright claims filed in the new action before Judge Tevrizian. Although there were some claims in the new filing that were not precluded by Judge Rea's judgment, the claims that were precluded were substantial, formed the nucleus of the claims disputed by the parties, and supported the district court's award of Rule 11 sanctions. Thus, we affirm Judge Tevrizian's imposition of those sanctions against Ivanova and his counsel. We decline to reduce the amount of the sanctions, or to remand to the district court for it to consider a reduction. The district court has already made a substantial reduction in the hourly rate and the number of hours claimed by Columbia's attorneys.

D. Denial of Disgorgement

In Case No. 03-55431, Columbia argues that Judge Rea erred by declining to order disgorgement of the money Ivanova received from licensing Cantinflas motion pictures in Mexico.

Disgorgement is an equitable remedy and a district court has "broad discretion" in deciding whether to employ it. *S.E.C. v. Clark*, 915 F.2d 439, 454 (9th Cir.1990). Here, Columbia offers no reason why it cannot pursue its disgorgement claim in the courts of Mexico and obtain such legal relief as to which it may be entitled. Thus, from what appears in the record before us, Columbia has an adequate remedy at law that it can pursue. "It is a basic doctrine of equity jurisprudence that courts of equity should not act ... when the moving party has an adequate remedy at law...." *Mort v. United States*, 86 F.3d 890, 892 (9th Cir.1996) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992)) (alterations in original).

The district court's failure to include in its judgment an express ruling on the disgorgement claim does not mean the court overlooked the claim. The claim was presented to the court, and by not granting it, the court denied it. We conclude that, in Case. No. 03-55431, the district court did not abuse its discretion by declining to order disgorgement.

E. Conclusion

In Case Nos. 02-56222 and 03-56207, Ivanova's appeals are dismissed pursuant to the fugitive disentitlement doctrine.

Appendix A

The district court's Rule 11 sanctions order against Ivanova's counsel, and against Ivanova, in Case No. 03-56207, is affirmed. The district court's judgment, challenged by Columbia in Case No. 03-55431 is affirmed.

Columbia shall recover all of its costs of appeal in Case Nos. 02-56222 and 03-56207. Columbia did not prevail in its appeal in Case No. 03-55431, and it shall not recover its costs for that appeal; nor shall Ivanova recover costs for that appeal, being precluded therefrom by the fugitive disentitlement doctrine.

The unopposed request for Joinder in Appellant's Briefs is granted. None of the other pending motions filed by the parties, and as yet not ruled upon by this court, require further discussion. All pending motions are denied.

Appeals DISMISSED in part and AFFIRMED in part. Costs ALLOCATED as stated above. Pending motions DENIED. No request by any party for reconsideration of the denial of any pending motion shall be filed or entertained.

APPENDIX B — PHASE II BENCH TRIAL: FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED JUNE 7, 2002

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 97-0615 WJR (CTx)

EDUARDO MORENO LAPARADE,

Plaintiff,

v.

COLUMBIA PICTURES INDUSTRIES, INC., a California corporation; MARIO MORENO IVANOVA, an individual, and as Executor of THE ESTATE OF MARIO MORENO REYES,

Defendants.

AND RELATED COUNTERCLAIMS.

PHASE II BENCH TRIAL:
FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter was heard by the Court in a second phase of a bench trial conducted on August 7, 2001 and February 26, 2002 through March 19, 2002. Timothy C. Riley appeared on behalf of Defendant Mario Moreno Ivanova ("Ivanova"). Henry J. Tashman and Jennifer L. Brockett appeared on behalf of Defendant Columbia Pictures Industries, Inc. ("Columbia"). Based on the evidence presented at trial, the post-trial briefs,

the parties proposed findings of fact and conclusions of law, and the applicable law, the Court now makes the following Findings of Fact and Conclusions of Law. *See* Fed. R. Civ. P. 52.

FINDINGS OF FACT

1. This action primarily is one for interpleader and declaratory relief regarding who owns the worldwide intellectual property rights and related rights, in whole or in part, for thirty-four motion pictures ("Motion Pictures') starring Mario Moreno Reyes, better known by his stage name "Cantiflas."

2. This action commenced on January 30, 1997, when Eduardo Moreno Laparade ("Laparade"), Cantinflas' nephew, filed a complaint seeking declaratory relief against Columbia and Ivanova, individually and as executor of the estate of Cantinflas. Laparade claimed he held certain rights in the Motion Pictures through succession.

3. In response to Laparade's Complaint, Columbia filed crossclaims and counterclaims for declaratory relief and statutory interpleader against Laparade, Ivanova, Joyce Jett, Natasha Gelman and Authors' Rights Restoration Corp. ("ARRC").

4. Joyce Jett was Cantiflas' common-law ex-wife. The late Natasha Gelman was the widow of Jacques Gelman ("Gelman"). Jacques Gelman was Cantinflas' business partner and part-owner of the various production companies that produced the Motion Pictures. Janet Neschis is the Executor of the Gelman Estate, which was substituted into this action following the passing of Ms. Gelman. Ms. Neschis is a partner in the law firm of McLaughlin & Stern. Mrs. Neschis also is the daughter of Sidney

E. Cohn, who represented Cantinflas, Gelman and their production companies in a number of matters.

5. Prior to Phase I of trial, Columbia and ARRC settled with all parties except Ivanova. Pursuant to the settlement, Laparade, Jett and Gelman, *inter alia*, assigned their rights, if any, in the Motion Pictures to Columbia, and were thereafter dismissed from the case. ARRC's dispute with Columbia and Ivanova was tried in Phase I of trial.

6. Phase I of the bench trial was conducted on April 24, 2001 through May 2, 2001. On May 30, 2001, the Court held that "under the Collaboration Doctrine, and consequently under the laws of Mexico, the producer of a film is the author of the film. . . . Consequently, it is only the producers or the successors to the producers who are eligible to any restoration rights in the Motion Pictures." (May 30, 2001 Ord. at 12.)

The Motion Pictures

7. Columbia has a long history of business dealings, dating back to 1946, with Cantinflas, Gelman, and the various entities partly owned and/or controlled by Cantinflas and Gelman, including Posa Films, S.A. ("Posa"), Posa Films Internacional S.A. ("PFI"), Cantinflas Films, S.A. ("Cafisa"), Rioma Films, S.A. ("Rioma"), Alfa Films, S.A. ("Alfa"), and Telemont Anstalt Vaduz, a Liechtenstein entity ("Telemont"). Most or all of these entities have been dissolved and liquidated.

8. The Motion Pictures at issue in this litigation can be categorized into three groups based on their producers.

Appendix B

9. Posa produced twenty of the motion pictures ("20 Motion Pictures"), which, in order of first date of release in Mexico, are titled as follows: (1) *Ni Sangre Ni Arena*, (2) *El Gendarme Desconocido*, (3) *Los Tres Mosqueteros*, (4) *El Circo*, (5) *Romeo y Julieta*, (6) *Gran Hotel*, (7) *Un Dia Con El Diablo*, (8) *Soy un Profugo*, (9) *A Volar Joven*, (10) *El Supersabio*, (11) *El Mago*, (12) *El Portero aka Puerto Joven*, (13) *El Siete Machos*, (14) *Si Yo Fuera Diputado*, (15) *El Bombero Atomico*, (16) *El Senor Fotografo*, (17) *Cabellero a la Medida*, (18) *Abajo El Telon*, (19) *El Bolero de Raquel*, and (20) *Sube y Baja*. The 20 Motion Pictures were released in Mexico between 1941 and 1959.

10. PFI produced six of the motion pictures ("6 Motion Pictures"), which, in order of first date of release in Mexico, are titled as follows: (1) *El Analfabeto*, (2) *El Extra*, (3) *Entrega Inmediata*, (4) *El Padrecito*, (5) *El Senor Doctor*, and (6) *Su Excelencia*. The 6 Motion Pictures were released in Mexico between 1961 and 1967.

11. Various production companies produced the last eight films at issue in this litigation ("8 Motion Pictures"). In order of release in Mexico, PFI produced the first three: *Por Mis Pistolas*, *El Profe* and *Un Quijote Sin Mancha*. Rioma produced the next three: *Conserje en Condominio*, *El Ministro y Yo* and *El Patrullero 777*, and it co-produced one picture --*Don Quijote Cabalga de Neuvo* -- with Oscar Producciones Cinematografica, S.A. Lastly, Cafisa produced the last of the 8 Motion Pictures, *El Barrendero*.[1]

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1. Laparade's initial pleadings asserted claims as to 39 films. Columbia and Ivanova assert claims only as to 34 of those films; the remaining five films (*No Te Enganes Corazon*, *Asi Es Mi Tierra*, *Aquila o Sol*, *El Signo De La Muerta* and *Ahi Esta El Detalle*) are not at issue here.

Appendix B

The 20 Motion Pictures

12. Prior to 1959 and 1960, Posa -- the producer of each of the 20 Motion Pictures -- owned all right, title and interest to the 20 Motion Pictures, including all physical elements of the Motion Pictures.

13. Sidney E. Cohn, the attorney who represented Cantinflas, Gelman and Posa, planned and negotiated that Columbia would purchase the 20 Motion Pictures through a series of transfers. The basic structure of the sale was outlined in a November 18, 1959 Memorandum from Sidney E. Cohn to Columbia founder and board member Samuel Briskin. Although the details of the Buyout differ from that which was envisioned in Mr. Cohn's Memorandum, the basic structure was effectuated.

14. Specifically, in two agreements, dated January 15, 1959 and January 18, 1960, Posa sold all of its rights in the 20 Motion Pictures to Patientia Anstalt ("Patientia"), a Lichtenstein entity, as well as title to the film elements (negatives, prints, etc.) that embodied the works (hereinafter referred to as Film Rights), for payment in U.S. dollars. These contracts were found in Columbia's files and in Mr. Cohn's files in New York. Ivanova did not find copies of these contracts in Posa's files in Mexico.

15. In the first agreement, dated January 15, 1959, Posa transferred ten of the 20--Motion Pictures to Patientia, which were: (1) *El Mago*, (2) *El Portero*, (3) *El Siete Machos*, (4) *El Bombero Atomico*, (5) *Si Yo Fuera Diputado*, (6) *El Senor Fotografo*, (7) *Caballero A La Medida*, (8) *Abajo El Telon*, (9) *El Bolero De Raquel* and (10) *Sube y Baja*. Article 1 of that agreement states:

Appendix B

> We, hereinafter referred to as "Seller" warrant and represent to you, hereinafter referred to as "Purchaser" that Seller [Posa] is the producer of and the sole and exclusive owner of the full, complete, unencumbered and marketable title of the ten (10) motion pictures listed in Article 2 hereof, and of each and all the rights, licenses and privileges hereinafter sold, assigned and transferred to Purchaser hereunder, and that Seller as the full right, power and authority to enter into and perform this agreement.

16. Article 3 of the agreement also expressly transfers full ownership of the intellectual property rights, as well as the film elements, from Posa to Patientia:

> Seller [Posa] hereby irrevocably sells, assigns, transfers and sets over to Purchaser [Patientia] said Ten Pictures, together with full, complete, unencumbered and marketable title thereto, as well as like title to all negatives, prints, and other physical properties thereof, as well as like in title in and to any and all literary, dramatic, and musical material used in said pictures or acquired in connection with the production thereof, including without limitation all of the following:
>
> . . .
>
> b) The original picture negatives of said pictures.
>
> c) All negatives, prints and other physical properties. . . .

Appendix B

> g) All copyrights and rights to obtain copyrights and renewals thereof, . . . [and]
>
> h) All other rights of every kind and nature which are now owned or controlled by Seller [Posa] in and to said Ten Pictures or in the material from which the same was produced together with all of Seller's [Posa's] right, title and interest in and to the above.

17. Article 7 further states that Patientia was acquiring "the copyright and the right to obtain, renew and extend copyright" in the 10 Motion Pictures "free and clear of all claims on behalf of any third party."

18. This agreement was signed by Cantinflas on behalf of Posa and Cantinflas also signed a "sub-joinder" in the agreement, personally ratifying the transfer.

19. In the second agreement dated January 18, 1960, Posa transferred all of its rights in the remaining ten of the 20 Motion Pictures to Patientia, which were: (1) *Soy un Profugo*, (2) *A Volar Joven*, (3) *El Supersabio*, (4) *El Circo*, (5) *Romeo y Julieta*, (6) *El Gendarme Desconocido*, (7) *Ni Sangre Ni Arena*, (8) *Los Tres Mosgueteros*, (9) *Gran Hotel* and (10) *Un Dia Con El Diablo*.

20. The relevant language of the January 18, 1960 agreement is identical to that contained in the January 15, 1959 agreement.

21. Again, this agreement was signed by Cantinflas on behalf of Posa and Cantinflas also signed a "sub-joinder" in the agreement, personally ratifying the transfer.

Appendix B

22. By an agreement dated February 23, 1960, Patientia sold the Film Rights in the 20 Motion Pictures to Movag Establishment Vaduz, also a Liechtenstein entity ("Movag"), for payment in U.S. dollars. The agreement specifically references the two Posa-Patientia agreements and states that Patientia holds "full, complete, unencumbered and marketable title in each of the 20 Motion Pictures," and is transferring "full, complete, unencumbered and marketable titles to said 20 Motion Pictures, all other rights licenses and privileges sold, granted and transferred to [Patientia] under the Buyout Agreements, with the benefit of all warranties and representations made to us by Posa thereunder."

23. This Patientia-Movag agreement was found in Columbia's files and in Mr. Cohn's files in New York. Ivanova did not find a copy of this contract in Posa's files in Mexico.

24. By an agreement dated February 24, 1960, Movag sold the Film Rights in the 20 Motion Pictures to Showthern, Ltd., a U.K. corporation ("Showthern"). This agreement references all three prior agreements, and states that Movag transferred to Showthern all "licenses and privileges under the Buyout Agreements in, to, or in connection with said 20 Motion Pictures, including without limitation, full, complete and marketable title to said motion pictures. . . ." The agreement indicates it was witnessed by Mr. Cohn, Cantinflas' attorney.

25. By an agreement dated March 10, 1960, Showthern sold the Film Rights in the 20 Motion Pictures to Columbia Pictures Corporation, Ltd. ("CPCL"). At the time, CPCL was a British subsidiary of Columbia Pictures Corporation ("CPC"), which, in turn, is the corporate predecessor to Columbia; CPCL currently is an affiliate of Columbia.

26. Again, the Showthern-CPCL agreement references the prior transfer agreements and states "the Assignor [Showthern] hereby sells and assigns unto the assignee ALL THOSE said film rights comprised in and assigned by the Rights Agreements and all other (if any) the benefit of such Agreements in so far as the same has passed to the Assignor TO HOLD the same unto the Assignee [CPCL] absolutely. . . ."

27. Although the document has only type-written signatures, Kenneth Maidment -- who, at the time-of this transaction, was CPCL's secretary -- credibly testified that the agreement was fully-executed by all signatories and sealed, and that the document presented into evidence represents a conformed copy of the agreement. Notwithstanding a diligent search, Columbia was unable to locate a copy of the agreement with signatures and seal. The Court rejects the suggestion this was merely a draft document.

28. On May 27, 1987, CPCL signed a Power of Attorney appointing Columbia to be its "true and lawful attorney and/or agent, thereby empowering Columbia, in CPCL's "name, place and stead" to "procure and maintain the protection of (CPCL's) copyright" in all films owned by CPCL, and to "appoint attorneys and counsel to represent [CPCL] in the protection and enforcement of such copyright and proprietary rights. . . ."

29. On March 13, 2002, CPCL transferred the Film Rights in the 20 Motion Pictures to Columbia, via a nunc pro tunc assignment effective as of March 11, 1960.

30. Numerous other documents corroborate this chain of title.

Appendix B

31. Ivanova relies upon a 1963 agreement transferring title to the 20 Motion Pictures from Posa to Cantinflas to support his claim of ownership of the 20 Motion Pictures. First, Posa sold the same 20 Motion Pictures to Patientia in 1960 -- three years prior -- so Posa would not have had anything to transfer in 1963. Second, Ivanova's testimony was contradictory regarding the circumstances under which this agreement was located. Third, unlike the other agreements transferring rights in the films, Ivanova's 1963 agreement was not found in Mr. Cohn's, Cantinflas' attorney, files. And fourth, this transfer is not corroborated by any other documents. In fact, it is contradicted by dozens of documents. Due to the numerous factors undermining the validity and authenticity of this 1963 transfer, the Court need not specifically address the authenticity of the signatures.

32. The Court finds Ivanova's 1963 transfer agreement to not be reliable, credible evidence sufficient to support Tvanova's claim of ownership.

33. Ivanova testified that he is in possession of all of the original picture negative reels for 33 of the 34 Motion Pictures, which he testified he inspected in early 2002.

34. Ivanova's testimony was strongly contradicted by two witnesses: Vanessa O'Kelley, an Inspector Printer in the Motion Picture Conservation Center of the Library of Congress, and Grover Crisp, Sony Pictures Entertainment's Vice President of Asset Management and Film Restoration.

35. Ms. O'Kelley testified that the Library of Congress possessed original picture negatives for five of the 20 Motion

Pictures. Ms. O'Kelley was a credible witness, experienced in the matters to which she testified, and the Court finds her testimony believable.

36. Mr. Crisp testified, with reference to a computer database printout maintained in the ordinary course of business, that Columbia possessed film elements for all 34 Motion Pictures, including original picture negatives for 16 of the films. Notwithstanding the errors contained in the database printout, the Court finds Mr. Crisp to have been a credible witness, experienced in the matters to which he testified, and the Court finds Mr. Crisp's testimony believable.

The 6 Motion Pictures

37. Prior to 1968, PFI -- the producer of the 6 Motion Pictures -- owned all right, title and interest to the 6 Motion Pictures, including all physical elements of the 6 Motion Pictures.

38. Prior to January 31, 1968, Telemont acquired from PFI all non-U.S. rights in the 6 Motion Pictures, and Alfa acquired from PFI all U.S. rights in the 6 Motion Pictures. These transfers were not disputed.

39. On January 31, 1968, through two separate agreements, Telemont and Alfa then sold the rights in the 6 Motion Pictures to "Columbia Pictures Corporation," the predecessor to Columbia. A copy of this contract was found in Columbia's files and in Mr. Cohn's files in New York. Ivanova did not find a copy of this contract in PFI's files in Mexico.

40. Both of these contracts contain language similar to that which is in the agreements relating to the 20 Motion Pictures.

41. Numerous other documents corroborate this chain of title.

42. Ivanova relies upon a 1972 agreement transferring title to the 6 Motion Pictures (as well as 3 of the 8 Motion Pictures) from PFI to Cantinflas to support his claim of ownership of the 6 Motion Pictures.

43. The Court finds this evidence to be incredible for the same reasons the Court finds Ivanova's 1963 agreement to be not credible, and finds this evidence is not sufficient to support Ivanova's claim of ownership.

The 8 Motion Pictures

44. The last set of motion pictures at issue in this litigation are the 8 Motion Pictures. The interests Columbia and Ivanova claim in the 8 Motion Pictures are different from those asserted in the other 26 Motion Pictures. Specifically, Ivanova contends that he owns the 8 Motion Pictures as the putative successor of Cantinflas. Columbia, on the other hand, asserts more limited rights in the 8 Motion Pictures, including distribution rights and rights of first refusal.[2]

45. Ivanova's asserted ownership claim in three of the a Motion Pictures (*Por Mis Pistolas*, *Un Quijote Sin Mancha* and *El Profe*) rests on a 1972 agreement transferring the rights in these films from PFI to Cantinflas, which this Court finds to be not credible.

---

2. Columbia, however, makes no claim of rights as to the film *Don Quijote Cabalga de Nueva*.

46. Ivanova did not present any evidence to support his ownership claim in the remaining five films: *Don Quijote Cabalga de Nuevo, Conserie en Condominio, El Ministro y Yo, El Patrullero 777* and *El Barrendero.*

47. The Court need not make findings as to Columbia's interests in the 8 Motion Pictures for the reasons stated below.

CONCLUSIONS OF LAW

48. To the extent any of the following conclusions of law are deemed to be findings of fact, or mixed questions of law and fact, they are incorporated into the "Findings of Fact." Likewise, to the extent any of the foregoing findings of fact are deemed to be conclusions of law, they are incorporated herein.

49. The Court has subject matter jurisdiction over this action pursuant to (i) its ongoing jurisdiction to enforce the 1994 Stipulated Judgment, (ii) Statutory Interpleader because there are diverse claimants as to the interpleader *res* that Columbia has deposited with the Court, and (iii) the Copyright Act, Chapter 17 of the United States Code.

50. As to the 20 Motion Pictures, Posa was the author and owner of all right, title and interest to the 20 Motion Pictures.

51. Through the various agreements referenced above, Posa transferred indirectly to Showthem the Film Rights in the 20 Motion Pictures. Each of the documents reflecting these transactions satisfy the writing requirement of 17 U.S.C. § 204.

52. Because Posa initially transferred the Film Rights in the 20 Motion Pictures to Patientia in 1959 and 1960, Posa could not have transferred those same 20 Motion Pictures to Cantinflas in 1963. Therefore, even assuming Ivanova's 1963 transfer agreement was authentic, it was an ineffective transfer of rights because, at that time, Posa had nothing to transfer.

53. The Court concludes that the March 10, 1960 Showthern-CPCL Buyout was executed and constituted an effective transfer. Furthermore, this conformed-copy agreement satisfies 17 U.S.C. § 204 (a).

54. Notably, although Ivanova most strongly takes issue with the Showthern-CPCL link in the chain of transfers from Posa indirectly to Columbia, a finding that the Showthern-CPCL transfer was not properly effectuated would not support Ivanova's claim of ownership; it would only establish that Showthern, not Ivanova and not Columbia, owns the films. Therefore, notwithstanding this Court's conclusion that CPCL validly received the Film Rights in the 20 Motion Pictures, a contrary finding would be of little moment.

55. CPCL then effectively transferred the Film Rights in the 20 Motion Pictures to Columbia through a Power of Attorney and a *nunc pro tunc* assignment.

56. Columbia has satisfied its burden to show that it owns the Film Rights in the 20 Motion Pictures. In contrast, Ivanova has not satisfied his burden to show that he owns the Film Rights in the 20 Motion Pictures. The Court concludes that Ivanova's evidence regarding possession of the original pictures negatives is legally irrelevant, and, notwithstanding this fact, not credible.

57. As to the 6 Motion Pictures, PFI was the author and owner of all right, title and interest to the 6 Motion Pictures.

58. Prior to 1968, PFI transferred the Film Rights in the 6 Motion Pictures to Telemont (non-U.S. rights) and Alfa (U.S. rights). Each of the documents reflecting these transactions satisfy the writing requirement of 17 U.S.C. § 204.

59. On January 31, 1968, Telemont and Alfa sold to Columbia the Film Rights to the 6 Motion Pictures. Each of the documents reflecting these transactions satisfy the writing requirement of 17 U.S.C. § 204.

60. Because PFI transferred the Film Rights in the 6 Motion Pictures to Telemont and Alfa prior to 1968, and they, in turn, transferred the Film Rights in the 6 Motion Pictures to Columbia on January 31, 1968, PFI could not have transferred those same 6 Motion Pictures to Cantinflas in 1972. Therefore, even assuming Ivanova's 1972 transfer agreement was authentic, it was an ineffective transfer of rights because, at that time, PFI had nothing to transfer.

61. Columbia has satisfied its burden to show that it owns the Film Rights in the 6 Motion Pictures. In contrast, Ivanova has not satisfied his burden to show that he owns the Film Rights in the 6 Motion Pictures.

62. As to the 8 Motion Pictures, the Court concludes that Ivanova's 1972 agreement is not credible, authentic evidence sufficient to support a finding that Cantinflas owned three of the 8 Motion Pictures.

63. Ivanova has not offered any evidence supporting his claim that Cantiflas owned the remaining five of the 8 Motion Pictures.

64. Having failed to demonstrate ownership of the 8 Motion Pictures, Ivanova does not have the power to trigger Columbia's rights, if any, in the 8 Motion Pictures. Given this conclusion, the Court need not make findings or conclusions as Columbia's rights to the 8 Motion Pictures.

CONCLUSION

1. Based on the foregoing Findings of Fact and Conclusions of Law, the Court hereby declares Columbia to be the owner of all rights, title and interest in the 20 Motion Pictures and the 6 Motion Pictures. Ivanova holds no ownership interest in the 20 Motion Pictures or the 6 Motion Pictures. Ivanova's rights, if any, to receive motion picture participations with respect to these 26 Motion Pictures as set forth in the 1994 Stipulated Judgment shall be determined in the action entitled *Columbia Pictures Industries, Inc. v. Ivanova*, CV 01-1969 WJR (AJWx). Ivanova holds no ownership rights in or to the 8 Motion Pictures.

2. Because Columbia has demonstrated that its distribution of the 26 Motion Pictures is in accordance with its ownership rights, and because Ivanova has not established any right to distribute the 8 Motion Pictures (or any of the other films), the Court hereby orders that all funds Columbia has deposited into the interpleader account plus any accrued interest be immediately returned to Columbia.

3. Because Ivanova has not established his ownership of the 8 Motion Pictures, and, therefore, has no power to trigger any

rights Columbia may have in those films, the Court hereby orders that the $165,000 that Columbia deposited into the 2001 Court Account (in accordance with Columbia's purported exercise of its right of first refusal, triggered by Ivanova under the assumption Ivanova had the right to trigger such action) be immediately returned to Columbia.

4. Columbia having shown success on the merits, irreparable injury, inadequacy of legal remedies, and that the balance of equities favors injunctive relief, *Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998), the Court hereby permanently enjoins Ivanova, his agents, servants, employees and attorneys, and those in active concert or participation with him or them, from licensing, distributing, marketing, offering for distribution or sal, or otherwise exploiting or benefitting from any of the 34 Motion Pictures. This permanent injunction acts to vacate and supersede the preliminary injunctions entered on August 10, 2001 and November 21, 2001.

5. Ivanova is hereby ordered to turn over to Columbia all film elements for the 26 Motion Pictures that he may have in his possession, custody or control.

6. Because Ivanova has not established any rights in the 8 Motion Pictures, the Court hereby orders that any film elements for the 8 Motion Pictures that Ivanova may have in his possession, custody or control be turned over to the Court, to be held at Consolidated Film industries ("CFI"), at Columbia's expense. No party shall have access to these film elements absent prior order from this Court.

7. With regard to the film canisters stored at CFI pursuant to this Court's March 15, 2002 Order, the Court hereby vacates

that order subject to the following: Columbia and Ivanova shall, on an agreed upon date no later than 60 days from the entry of these Findings of Fact and Conclusions of Law, jointly inspect the contents of the film canisters. Any film elements belonging to the 26 Motion Pictures shall be released to Columbia. Any film elements belonging to the 8 Motion Pictures shall be maintained in accordance with paragraph 6, above. Columbia's $1.00 security deposited with the Court pursuant to the March 15, 2002 Order shall be returned to Columbia.

8. With regard to attorneys' fees and cost 6, the Court hereby orders the parties to submit briefing on the issue pursuant to the following schedule: Columbia shall personally serve and file its briefing within 30 days from entry of these Findings of Fact and Conclusions of Law. Ivanova shall personally serve and file its response within 14 days of service of Columbia's briefing. Columbia shall personally serve and file any reply within 7 days of service of Ivanova's response.

9. Additionally, the contempt award of $15,413.72 ordered by this Court on February 15, 2002, shall be paid immediately by Ivanova to Columbia. The Court declines to require Ivanova to post a security for remaining sanctions and costs. The hearing previously set for June 10, 2002, is hereby taken off calendar.

IT IS SO ORDERED.

DATED: June 7, 2002

s/ William J. Rea
WILLIAM J. REA
United States District Judge

APPENDIX C — ORDER GRANTING COLUMBIA'S MOTION FOR PRELIMINARY INJUNCTION OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA FILED NOVEMBER 20, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 97-0615 WJR (CTx)

Date: November 16, 2001
Time: 9:30 a.m.
Dept.: Courtroom of the
Honorable William J. Rea

EDUARDO MORENO LAPARADE,

Plaintiff,

v.

COLUMBIA PICTURES INDUSTRIES, INC., a California corporation; MARIO MORENO IVANOVA, an individual,-and as Executor of THE ESTATE OF MARIO MORENO REYES,

Defendants.

AND RELATED CROSS-CLAIMS, COUNTERCLAIMS AND THIRD PARTY CLAIMS

Appendix C

ORDER GRANTING COLUMBIA'S MOTION FOR A PRELIMINARY INJUNCTION

The Motion for a Preliminary Injunction, brought by Columbia Pictures Industries, Inc. ("Columbia"), came on regularly for hearing on November 16, 2001, at 9:30 a.m. Henry J. Tashman and Jennifer L. Brockett of Davis Wright Tremaine LLP appeared on behalf of Columbia. Timothy C. Riley of Riley & Riley appeared on behalf of Mario Moreno Ivanova, individually and as executor of the estate of Mario Moreno Reyes ("Ivanova"). Having considered the memoranda and evidence submitted in support of and in opposition to the Motion, all admissible evidence offered by the parties, all relevant authorities, the arguments of counsel, and all other matters presented to the Court, **IT IS HEREBY ORDERED THAT**:

Ivanova, his agents, servants, employees and attorneys, and those in active concert or participation with him or them, are prohibited from licensing, marketing, offering for distribution or sale or otherwise exploiting or benefiting from any of the 34 Motion Pictures listed on Appendix A hereto anywhere throughout the world. This Order is effective from the date of the hearing of this matter, and shall continue to be effective until a final judgment is entered after the conclusion of all trial phases in this matter or until the Court otherwise Orders.

Dated: Nov. 20, 2001

Appendix C

s/ William Rea
The Honorable William Rea
United States District Court Judge for the
Central District of California

Submitted by:
DAVIS WRIGHT TREMAINE LLP
HENRY J. TASHMAN
JENNIFER L. BROCKETT

By: s/ Jennifer L. Brockett
Jennifer L. Brockett
Attorneys for Defendant,
Counterclaimant, Cross-Claimant and
Counterdefendant COLUMBIA
PICTURES INDUSTRIES, INC.

APPENDIX D — AMENDED ORDER GRANTING COLUMBIA'S MOTION FOR PRELIMINARY INJUNCTION OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA FILED JULY 31, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 97-0615 WJR (CTx)

EDUARDO MORENO LAPARADE,

Plaintiff,

v.

COLUMBIA PICTURES INDUSTRIES, INC., a California corporation; MARIO MORENO IVANOVA, an individual, and as Executor of THE ESTATE OF MARIO MORENO REYES,

Defendants.

AND RELATED CROSS-CLAIMS, COUNTERCLAIMS AND THIRD PARTY CLAIMS

AMENDED ORDER GRANTINGCOLUMBIA'S MOTION FOR PRELIMINARY

The Motion For Preliminary Injunction, brought by Columbia Pictures Industries, Inc. ("Columbia's, came on regularly for hearing on July 20, 2001, at 9:30 a.m. Henry J.

Appendix D

Tashman of Davis Wright Tremaine LLP appeared on behalf of Columbia. Timothy Riley of Riley & Riley appeared on behalf of Mario Moreno Ivanova as an individual and on behalf of the Estate of Mario Moreno Reyes ("Ivanova"). After considering the moving and opposing papers, arguments of counsel and all other matters presented to the Court,

It is Hereby Ordered as follows:

The Tentative Ruling attached hereto as Exhibit "A" is the Order of this court. Columbia's Motion for Preliminary Injunction is granted as follows:

1. Ivanova is required to comply with its contractual obligations related to Columbia's rights of first refusal and/or option rights with respect to the following 8 motion pictures: (1) "Por Mis Pistolas;" (2) "Un Quijote Sin Mancha;" (3) "Conserje en Condominio;" (4) "El Barrendero;" (5) "El Ministro y Yo;" (6) "El Patrullero 777; (7) "El Profe;" and (8) "Don Quijote Cabalga de Nuevo" (the "8 Motion Pictures"). Such contractual obligations include providing Columbia notice of any bona fide offer from a third party to license the 8 Motion Pictures and providing Columbia 30 days to match that offer.

2. Ivanova's notice to Columbia of any third party offer must include all material terms of that offer, and Columbia's 30 days to match the third party offer shall not begin to run until those material terms are provided to Columbia in writing. Currently, Ivanova has represented to this Court that CineVideo International ("CineVideo") has made an offer

to Ivanova. Ivanova's counsel also represented that he would provide all material terms of that offer by responding to all questions set forth in Henry Tashman's letter dated June 29, 2001, attached as Exhibit MM to Columbia's Motion for Preliminary Injunction. Therefore, Columbia's 30 days to match the CineVideo offer shall begin on the day of Columbia's receipt of Mr. Riley's responsive letter. Mr. Riley represented to the Court that his responsive letter would be completed and delivered to Columbia on July 20, 2001.

3. If Ivanova enters any contract to license, distribute or exploit the 8 Motion Pictures in any media any where in the world with any person or company other than Columbia, Ivanova shall account to Columbia, Eduardo Moreno Laparade and the Estate of Natasha Gelman, for all monies derived from or under such contract. All monies received by or payable to Ivanova from or under such contract shall, without any deductions, be deposited – within 20 days of receipt – in a new fund to be established by Columbia with this Court (the "New Court Account").

4. If Columbia exercises its rights of first refusal or option to distribute the 8 Motion Pictures, then all monies to be paid by Columbia under any contract to license, distribute or exploit the 8 Motion Pictures – including payments to Ivanova, the Estate of Natasha Gelman or Eduardo Moreno Laparade – shall be paid instead into the New Court Account.

5. All money payable to Ivanova from or under any contract to license, distribute or exploit the 8 Motion Pictures (if any) shall remain in the New Court Account until further order of this Court.

6. The Clerk of the Court is hereby directed to set up the New Court Account (which shall be separate from the Interpleader Account established pursuant to this court's Order on April 11, 2004). The Clerk of the Court shall transfer all money deposited by any party pursuant to this Order to an interest bearing instrument with a maturity of six (6) months or less at an independent banking institution insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation.

7. Ivanova shall serve a copy of this Order on any party with which it enters into a license agreement in relation to the 8 Pictures and file the proof of service with this Court no later than 10 days after Ivanova enters such license agreement.

Dated: July 30, 2001

s/ William J. Rea
HONORABLE WILLIAM J. REA
UNITED STATES DISTRICT COURT JUDGE

Submitted by:

DAVIS WRIGHT TREMAINE LLP
HENRY J. TASHMAN
JENNIFER L. BROCKETT

By: s/ Henry J. Tashman
HENRY J. TASHMAN
Attorneys for Defendant,
Counterclaimant, Cross-Claimant and
Counterdefendant COLUMBIA
PICTURES INDUSTRIES, INC.

Appendix D

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TENTATIVE RULING

Case Number: CV 97-0615 WJR (CTx)

Docket Number:

Title: *Laparade v. Columbia Pictures Industries, Inc.*

Date: July 20, 2001

Nature of Motion: Columbia's Motion for Preliminary Injunction

HON. WILLIAM J. REA, JUDGE

Marva Dillard, Deputy Clerk

TENTATIVE RULING

This Court is inclined to GRANT, in part, Columbia's Motion for a Preliminary Injunction. It appears that Columbia has demonstrated the existence of at least serious questions going to the merits and that the balance of hardships tips in its favor. This Court is also inclined to Order that Ivanova provide Columbia with the details of any potential offers to acquire the rights to license the eight films and, subsequently, provide Columbia with thirty days to match that offer. This

Court is not, however, inclined to restrain Ivanova's ability to exploit the films. Additionally, this Court is inclined to Order Ivanova to account for any proceeds and deposit the same in the accounts pending the resolution of the litigation.

DISCUSSION

I. Legal Standard

The standard for granting a preliminary injunction is well-settled: to obtain a preliminary injunction, a party must show either (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in its favor. *See Miss World (UK) Ltd. v. Mrs. America Pageants, Inc.*, 856 F.2d 1445, 1448 (9th Cir. 1988). These are not two distinct tests, but rather the opposite ends of a single continuum in which the required showing of harm varies inversely with the required showing of meritoriousness. *See id.*

To obtain a preliminary injunction, the moving party must show probability (not mere possibility) of success at the ultimate trial on the merits. *See* 5 J. Thomas McCarthy, *Trademarks and Unfair Competition* § 30:45 (4th ed. 1997); *see also W.E. Bassett Co. v. Revlon, Inc.*, 354 F.2d 868, 871 (2d Cir. 1966). "Probability of success" implies that the moving party must have a very clear and strong case. *See id.*

The grant of a preliminary injunction is the exercise of a very far-reaching power never to be indulged except in a case clearly warranting it. *See Dymo Indus., Inc. v. Tapeprinter,*

Inc., 326 F.2d 141, 143 (9th Cir. 1964). A preliminary injunction is an extraordinary remedy; it is the exception, rather than the rule. *See United States v. Lambert*, 695 F.2d 536, 539 (11th Cir. 1983). A trial judge is not required to decide difficult legal and factual issues which could only be determined at a full trial. *See* 5 McCarthy, *supra*, § 30:45. The existence of any debate or doubts on the record as to the merits of the claim will ordinarily bar the granting of a preliminary injunction. *See Sid Berk, Inc. v. Uniroyal, Inc.*, 425 F.Supp. 22, 29 (C.D. Cal. 1977). Some courts have stated this in terms of the maxim that in considering preliminary injunctive relief "to doubt is to deny." *See* 5 McCarthy, *supra*, § 30:45. That is, if there is a doubt as to the plaintiff's ultimate success on the merits, the preliminary injunction should be denied. *See id.*

Further, a court must be mindful that the ultimate goal of a preliminary injunction is to preserve the status quo and relative positions of the parties pending a determination of the action on its merits. *See King v. Saddleback Junior College Dist.*, 425 F.2d 426, 427 (9th Cir. 1970); *Warner Bros. Pictures v. Gittone*, 113 F.2d 292, 293 (3d Cir. 1940). Simply put, a preliminary injunction should not fundamentally alter the pre-existing status of the parties. *See id.* Thus, the burden on a party seeking a preliminary injunction is especially heavy if the relief sought would in effect grant the plaintiff a substantial part of the relief it would obtain after a trial on the merits. *See GTE Corp. v. Williams*, 731 F.2d 676, 679 (10th Cir. 1984).

Appendix D

II. Analysis

In this Motion for a Preliminary Injunction, Columbia Pictures Industries, Inc. ("Columbia") seeks to enjoin Mario Moreno Ivanova ("Ivanova") from licensing the distribution rights to eight of the Cantinflas films. Specifically, Columbia claims that it currently possesses the distribution rights to seven of those films. Significantly, Columbia also contends that it owns the contractual right of first refusal to seven[1] of these films. Pursuant to this purported right of first refusal. Columbia asserts that it is entitled to have thirty (30) days to match any other offers to buy the distribution rights in the films. Columbia now believes that Ivanova has reached a deal in principal with CineVideo Internacional ("CineVideo") to distribute the films. Thus, Columbia argues that this Preliminary Injunction is necessary to protect the rights of first refusal. Columbia seeks either an injunction prohibiting Ivanova's licensing of the distribution rights or, alternatively, an order mandating Ivanova to comply with its contractual obligations.

But that is not all. Matters are further complicated by the fact that Columbia contends that the ownership of the films must initially be resolved by the Mexican Courts. That is, currently, Ivanova and Eduardo Moreno Laparade ("Laparade") are litigating the issue of who is the successor in interest to Cantinflas. Accordingly, Columbia contends that only the prevailing party in Mexico can trigger Columbia's right of first refusal.

1. In the interests of accuracy, this Court acknowledges that actually Columbia claims to possess the right of first refusal in six films and the option to acquire the right of first refusal in a seventh.

Appendix D

A. Underlying Basis for Preliminary Injunction

Ivanova, in its first salvo at defeating this Motion, argues that an injunction in this case is not proper because there is no claim at issue in this litigation as to the validity of Columbia's right of first refusal. Ivanova rightly argues that it is fundamental that there be a claim that would entitle the plaintiff to the injunctive relief requested. *See Stewart v. United States I.N.S.*, 762 F.2d 193, 198 (2d Cir. 1985).

But it appears that Ivanova's argument must fail. Here, it is clear that the validity of Columbia's contractual right of first refusal is at issue in this action. Specifically, Columbia asserts its claim to these rights within the Pre-Trial Conference Order. *See* Pre-Trial Conference Order, p. 18. Certainly, this Court will, in resolving this matter, adjudge the validity of Columbia's purported right of first refusal and the corresponding contracts. In fact, there can be little dispute that if this case is resolved entirely in Columbia's favor, then it will have valid rights of first refusal in six and possibly seven of the eight films. Accordingly, this Court is inclined to reject Ivanova's argument that the request for a preliminary injunction be denied as without foundation.

But this Court is inclined to agree with Ivanova in one respect: Ivanova's position vis-a-vis Laparade is not a matter before this Court. This is, Columbia's request that this Court prevent Ivanova from licensing the films until the issue of successorship is resolved could not properly be the basis for an injunction in this Court. Rather, the part of the case is being exclusively litigated in the Mexican courts. As such, this Court is not inclined to intrude upon the province of

that court to resolve the successorship issue. If either Columbia or any third parties (e.g., Laparade) are concerned with Ivanova's alleged attempt to stand in the shoes of Cantinflas' successor and thereby to purportedly usurp the position of the prevailing party in the Mexican litigation, then an injunction as to that conduct should be sought in Mexico rather than in this Court. As this Court has stated many times, successorship issues will be resolved in Mexico. Therefore, this Court will only consider Columbia's request for an injunction with respect to the contractual rights of first refusal at dispute in this Court.

B. ***Serious Questions as to the Merits***

The standard for granting a preliminary injunction is well-settled: to obtain a preliminary injunction, a party must show either (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in its favor. *See Miss World (UK) Ltd. v. Mrs. America Pageants, Inc.*, 856 F.2d 1445, 1448 (9th Cir. 1988). As stated above, these are not two distinct tests, but rather the opposite ends of a single continuum in which the required showing of harm varies inversely with the required showing of meritoriousness. *See id.*

In this case, this Court is tentatively convinced that there are at least serious questions going to the merits with respect to the interpretation and validity of the contracts. This case has been litigated extensively and has survived various dispositive motions testing the strength of the parties' respective claims. Yet despite these frequent challenges, this

Court has allowed the case to proceed. Accordingly, it would be both illogical and inconsistent to now conclude that there are not at least serious questions going to the merits of this facet of the case.

For instance, there is some issue as to whether the contracts conveyed television distribution rights or merely theatrical distribution rights. Additionally, there is also an issue of whether Cantinflas validly executed these contracts. There appear to be serious questions as to these contracts and, accordingly, this Court is inclined to find that Columbia has met its burden as to the rights of first refusal.

But again, this Court is not inclined to express any opinion with respect to the Mexican litigation concerning the successorship issue. If Columbia, or more likely Laparade, has concerns regarding Ivanova's purported decision to assume the position of successor to Cantinflas, then that, as this Court has on many occasions stated, is a matter to be addressed with the Mexican courts.

C. *Balance of Hardships*

Measuring the hardship in this matter is a relatively (and, for this case, surprisingly) straightforward process. This Court must consider the burden on Ivanova to disclose, in detail, the terms of CineVideo's purported proposal to acquire the distribution rights and then allowing Columbia thirty (30) days to match it against the potential burden of increased uncertainty, potential diminution in value and additional litigation to Columbia. Additionally, this Court must factor in the hardship on Ivanova to account for and deposit any

proceeds in an escrow account pending the resolution of the litigation versus the hardship on Columbia to potentially pay repeatedly for the same rights.

It is rare that a proverb is more apt: an ounce of prevention is worth a pound of cure. While this Court certainly appreciates Ivanova's predicament as an individual whose primary source of income is entangled in a seemingly endless web of expensive litigation, it is nevertheless apparent that by respecting the purported right of first refusal puts Ivanova in a win-win situation. For instance, if Ivanova provides the details of the deal with CineVideo and gives Columbia thirty days to match, then it will either have secured an equally beneficial deal or will have obviated the need to litigate this matter. Whereas, proceeding without granting the right of first refusal will certainly add fuel and to an already raging fire of litigation and acrimony.

With respect to the catalog of potential hardships to Columbia if this injunction is not granted, the list is long and the potential harms significant. Columbia will forever lose the ability to take advantage of rights it believes it acquired for reasonable consideration. Additionally, it will be handcuffed in the ability to make important business decisions. Moreover, if Columbia prevails at trial, it will be extremely difficult to ascertain the value of the lost rights. Therefore, this Court is inclined to conclude that the balance of hardships tips in Columbia's favor.

Finally, it is important to consider the issue of the accounts designed to safeguard the proceeds from the Cantinflas films pending the resolution of the litigation. It is

clear that this account was created to allow the films to continue to be exploited while the litigation proceeded. The same must apply to Ivanova. Considering that the case, both here and in Mexico, is nearing resolution, it would appear to be ludicrous to allow Ivanova to exploit the films and keep all the proceeds for himself irrespective of the outcome of the litigation.

Accordingly, this Court is inclined to Order that if Ivanova does license the eight films to CineVideo, Columbia, or any other party, that the proceeds be accounted for and deposited in the account pending the resolution of this matter. This Court is certainly cognizant of the potential financial burden on Ivanova, but this is certainly necessary to prevent a potential end-run around the litigation.

Based on the foregoing, this Court is inclined to GRANT, in part, Columbia's Motion for a Preliminary Injunction. It appears that Columbia has demonstrated the existence of at least serious questions going to the merits and that the balance of hardships tips in its favor. This Court is also inclined to Order that Ivanova provide Columbia with the details of any potential offers to acquire the rights to license the eight films and, subsequently, provide Columbia with thirty days to match that offer. This Court is not, however, inclined to restrain Ivanova's ability to exploit the films. Additionally, this Court is inclined to Order Ivanova to account for any proceeds and deposit the same in the accounts pending the resolution of the litigation.

APPENDIX E — ORDER RE: MOTION FOR PARTIAL SUMMARY JUDGMENT AND MOTION TO ENJOIN PENDING MEXICAN LITIGATION OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA FILED MAY 10, 2000

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 97-0615 WJR (CTx)
Honorable William J. Rea
Courtroom 10

EDUARDO MORENO LAPARADE,

Plaintiff,

vs.

COLUMBIA PICTURES INDUSTRIES, INC., a California corporation; MARIO MORENO IVANOVA, an individual, and as Executor of THE ESTATE OF MARIO MORENO REYES,

Defendants.

AND RELATED COUNTERCLAIMS

ORDER RE: MOTION FOR PARTIAL SUMMARY JUDGMENT AND MOTION TO ENJOIN PENDING MEXICAN LITIGATION

On May 8, 2000, at 10:00 a.m. in Courtroom 10 of the Federal Court of the Central District of California, the

Honorable William J. Rea, Judge presiding, the Motion for Partial Summary Judgment and the Motion to Enjoin Pending Mexican Litigation came on for hearing before this Court. Henry J. Tashman and Rochelle Wilcox appeared on behalf of Columbia Pictures Industries, Inc. ("Columbia"), Timothy J. Riley appeared on behalf of Mario Moreno Ivanova, Virgil W. Mungy (and Geoffrey C. Brown appeared on behalf of Eduardo Moreno Laparade. Peter Smoot appeared on behalf of Natasha Gelman,[1] Gerald Panter appeared on behalf of Joyce Jett, and Christopher Larkin appeared on behalf of Authors' Rights Restoration Corporation ("ARRC")

I. Motion for Partial Summary Judgment

A. *Standard of Review*

Pursuant to Federal Rule of Civil Procedure 56, a court should award summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The principal inquiry is whether a genuine issue of material fact exists. *See* 10A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2725 (3d ed. 1998).

A fact is material if, under the substantive law governing the case, it "might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). There is a

1. Janet Neschis, as Preliminary Executor of the Estate of Natasha Gelman, now represents Natasha Gelman in this action.

"genuine" issue over a material fact "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The court need not, however, consider factual disputes that are irrelevant or unnecessary under the relevant substantive law. *See id.*

The moving party carries the burden of establishing that there is no genuine issue of material fact. *See Mutual Fund Investors v. Putnam Management Co.*, 553 F.2d 620, 624 (9th Cir. 1977). To survive the summary judgment motion, the responding party need only present evidence from which a jury might return a verdict in its favor. *See Anderson*, 477 U.S. at 255.

Finally, the Court notes that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249. Thus, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-159 (1970)).

B. ***Analysis***

Laparade filed a First Amended Complaint in this action on April 22, 1997 seeking a declaratory judgment that he is the sole owner of all right, title and interest in the Cantinflas films and that he is entitled to certain past and future Motion Picture Participations pursuant to the Stipulated Judgment. In response, Columbia filed an Interpleader Counterclaim and Cross-Claim on April 28, 1997 requesting that the Court

order Ivanova, Laparade, Gelman, Jett, and ARRC to interplead and litigate with Columbia, and with each other, their claims to certain past and future Motion Picture Participations and certain rights, under copyright or otherwise, to distribute or otherwise exploit the Cantinflas films.

The Court subsequently dismissed Laparade's First Amended Complaint. The Court held that the dispute as to whether Laparade or Ivanova is the successor to Cantinflas's interest in the Cantinflas films should be litigated in Mexico, as the parties agreed to the Stipulated Judgment, but that the remaining cross-claims and counterclaims regarding copyright ownership of the Cantinflas films and ownership of related rights should go forward. *See* July 12, 1999 Ord. Lifting Stay, at 2.

Accordingly, the issue of whether Ivanova or Laparade is the successor to Cantinflas' interest in the Cantinflas films must be litigated in Mexico. The issue of what rights Cantinflas' successor-in-interest retains in the Cantinflas films in relation to Columbia and ARRC, however, remains before this Court. Columbia now moves the Court for summary judgment against Ivanova, Laparade, Gelman, and Jett on the grounds of res judicata, equitable estoppel, waiver, and ratification. The Court finds, however, that summary judgment is not warranted.

1. *Admissibility of Evidence*

As a preliminary matter, the Court notes that issues may exist as to the admissibility of evidence submitted by the

parties to this action. Even if the Court considers the evidence, however, the Court finds that summary judgment is not warranted. Thus, the Court need not reach this issue. To the extent that the parties wish to object to evidence to be used at trial, the parties may make their objections by filing motions in limine before trial.

2. *Res Judicata*

The doctrine of res judicata includes both claim preclusion and issue preclusion. *See Robi v. Five Platters, Inc.*, 838 F.2d 318, 321 (1988). Claim preclusion treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same "claim" or "cause of action." *See id.* at 322. Claim preclusion prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding. *See id.* The requirements of claim preclusion are (1) a final judgment on the merits (2) between the same parties or their privies (3) over the same cause of action. *See Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1518 (9th Cir. 1985).

Here, the parties dispute whether this action involves the same cause of action as the First Interpleader Action. The most important factor in determining whether successive suits involve the same cause of action is whether the two suits arise out of the same transactional nucleus of facts. *See Constantini v. Trans World Airlines*, 681 F.2d 1199, 1202 (9th Cir. 1982); *International Union of Operating Engin'rs-Employers Constr. Indus. Indus. Pension, Welfare and Training Trust Funds v. Karr*, 994 F.2d 1426, 1430 (9th Cir.

1993). What is at issue is whether the judgment in the previous action precludes the legal harm that the second action seeks to redress. *See McClain v. Apodaca*, 793 F.2d 1031, 1034 (9th Cir. 1986).

Here, the Court finds that this suit does not involve the same cause of action as the First Interpleader Action. The First Interpleader Action merely resolved the issue of which parties were entitled to proceeds from the distribution of the Cantinflas films, whereas this action seeks to adjudicate the parties' ownership claims to the Cantinflas films. Although Columbia argues that the two suits involve the same transactional nucleus of operative facts because the same alleged film contracts are at issue in both actions, any ownership claims asserted by the other parties arise from different sources, not out of the alleged film contracts.

Further, although Columbia states that it merely seeks a judgment affirming the alleged film contracts that were the basis for the Stipulated Judgment and preventing Defendants from challenging the rights granted by those contracts, Columbia also argues that any ownership claims asserted by the other parties threaten Columbia's rights in the Cantinflas films. Moreover, even if Columbia merely seeks a judgment affirming the alleged film contracts, the Court finds that material issues of genuine fact exist as to whether the contracts produced by Columbia are in fact the contracts that were the basis for the Stipulated Judgment.

Thus, the Court finds that the two suits involve different causes of action. Further, the Court finds that even if Columbia merely seeks a judgment affirming the alleged film

contracts that were the basis for the Stipulated Judgment, genuine issues of material fact exist as to whether the contracts produced by Columbia are in fact the contracts that were the basis for the Stipulated Judgment. Accordingly, the Court denies the Motion for Partial Summary Judgment on the grounds of res judicata.

3. *Equitable Estoppel*

The doctrine of equitable estoppel prevents a party, by his action or inaction, from causing another to act to his detriment. The Ninth Circuit has developed four necessary factors to apply the doctrine of equitable estoppel: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. *See Bequette v. National Ins. Underwriters, Inc.*, 429 F.2d 896, 900 (9th Cir. 1970).

Here, the Court finds that Columbia does not demonstrate that it acted to its detriment. After the First Interpleader Action ended with the entry of the Stipulated Judgment, Columbia continued to distribute the Cantinflas films and derived income from its distribution of the films. Columbia's only allegation of detriment is that "Ivanova is claiming that the judgments he obtained in Mexico adjudicate Columbia's rights." Such allegations, however, do not rise to the level of detriment for the purposes of equitable estoppel.

Thus, the Court finds that Columbia does not demonstrate that it is acted to its detriment. Accordingly, the Court denies the Motion for Partial Summary Judgment on the grounds of equitable estoppel.

4. *Waiver*

Waiver is the intentional relinquishment of a known right with knowledge of its existence and the intent to relinquish it. *See CBS, Inc. v. Merrick*, 716 F.2d 1292, 1295 (9th Cir. 1983). Here, the First Interpleader Action merely resolved the issue of which parties were entitled to proceeds from the distribution of the Cantinflas films, whereas this action seeks to adjudicate the parties' ownership claims to the Cantinflas films. There is no indication that by signing the Stipulated Judgment, the parties intended to relinquish all claims to the Cantinflas films. Rather, the Court finds that the parties merely agreed to the allocation of proceeds from the distribution of the Cantinflas films.

Thus, the Court finds that the parties did not waive their claims by signing the Stipulated Judgment. Accordingly, the Court denies the Motion for Partial Summary Judgment on the grounds of waiver.

5. *Ratification*

Columbia argues that the doctrine of ratification precludes the other parties from asserting their claims in this action. Columbia cites *Lockwood v. Wolf Corp.*, 629 F.2d 603, 609 (9th Cir. 1980) for the proposition that a party is precluded from challenging a contract if the party accepts

the benefits of the contract or causes prejudicial reliance by his silence. That case, however, is inapposite. *Lockwood* deals with whether, under the law of the state of Washington, a corporation through its actions may ratify a settlement agreement negotiated by a corporate agent who lacks actual authority to bind the corporation. *See id.* at 609.

Thus, the Court finds that Columbia fails to demonstrate that the doctrine of ratification precludes the other parties from asserting their claims in this action. Accordingly, the Court denies the Motion for Partial Summary Judgment on the grounds of ratification.

II. Motion to Enjoin Pending Mexican Litigation

A. *Standard of Review*

As a general principle, one court should not interfere with or try to restrain proceedings in another court in an ordinary action in personam. *See Compagnie Des Bauxites De Guinea v. INS Co. of N. Am.*, 651 F.2d 877, 887 (3d Cir. 1981) (citing *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964)). Where judgment is sought in personam, two courts with concurrent jurisdiction may proceed with litigation at least until judgment is obtained in one case which may be used as res judicata in the other. *See id.* (citing *Princess Lida v. Thompson*, 305 U.S. 456, 466 (1939)). This principle applies even where one action is foreign. *See id.*

While a district court with jurisdiction over the parties has discretion to enjoin them from proceeding with an action in the courts of a foreign country, that power should be used

sparingly. *See Seattle Totems v. National Hockey League*, 652 F.2d 852, 855 (9th Cir. 1981). The issue is not one of jurisdiction, but of comity. *See id.* Comity dictates that foreign antisuit injunctions be issued sparingly and only in the rarest cases. *See Gau Shan Co., Ltd. v. Bankers Trust Co.*, 956 F.2d 1349, 1354 (6th Cir. 1992). The Ninth Circuit has held that in determining whether to issue a foreign antisuit injunction, courts should consider whether the foreign litigation would: (1) frustrate a policy of the forum issuing the injunction, (2) be vexatious or oppressive, (3) threaten the issuing court's in rem or quasi in rem jurisdiction, or (4) whether the proceedings prejudice other equitable considerations. *See Seattle Totems*, 652 F.2d at 855.

B. ***Analysis***

Here, Columbia moves the Court to enjoin Ivanova and Laparade from proceeding with actions pending in Mexico. The Court finds that equitable considerations warrant the issuance of an injunction.

Columbia filed its Interpleader Counterclaim and Cross-Claim in 1997, requesting that the Court adjudicate the parties' claims to certain past and future Motion Pictures Participations and certain rights, under copyright or otherwise, to distribute or otherwise exploit the Cantinflas films. The Court held that because the ownership claims threatened the validity of the Stipulated Judgment entered by the Court in the First Interpleader Action, the Court had jurisdiction over the ownership claims by virtue of the Court's express reservation of jurisdiction to enforce the Stipulated Judgment.

Ivanova and Laparade, however, seek to adjudicate their ownership claims in actions pending in Mexico. Ivanova and Laparade both name Columbia as a party to the actions pending in Mexico. Neither Jett nor Gelman are named as parties to the Mexican proceedings. If the Mexican proceedings result in a judgment naming either Ivanova or Laparade as the sole owner of all rights in the Cantinflas films, it could invalidate the Stipulated Judgment, thereby undermining the Court's jurisdiction over this action and extinguishing the interests of Jett and Gelman that were established by the Stipulated Judgment.

Thus, the Court finds that equitable considerations warrant the issuance of an injunction. Accordingly, the Court grants the Motion to Enjoin Pending Mexican Litigation and enjoins Ivanova and Laparade from litigating their ownership issues in Mexico. Ivanova and Laparade may continue to litigate in Mexico the dispute as to whether Ivanova or Laparade is the successor to Cantinflas's interest in the Cantinflas films, as the parties agreed in the Stipulated Judgment. The remaining cross-claims and counterclaims regarding copyright ownership of the Cantinflas films and ownership of related rights, however, will go forward in this Court.

III. Other Matters

Ivanova and Laparade both request that the Court continue the hearing on Columbia's Motion for Partial Summary Judgment. The Court already considered and decided Ivanova and Laparade's Ex Parte Applications to continue the hearing. The Court's decision is final. In

addition, the Court already instructed the parties that, absent extraordinary circumstances, the Court would not consider any requests for a continuance unless made by noticed motion or stipulation. *See* April 28, 2000 Ord. Re: Procedure Requesting Continuance Hr'g. Thus, the Court denies the request for a continuance.

Ivanova and Laparade also request that the Court stay these proceedings. The Court already indicated, however, that the Court "will not entertain any further requests to stay these proceedings." *See* April 11, 2000 Ord. Re: Mot. Dismiss, at 2. Thus, the Court denies the request for a stay.

Finally, the Court's patience is wearing thin with the obstructive behavior and delaying tactics undertaken by attorneys in this action. The Court has ruled numerous times that this action should go forward and be litigated before this Court. Further, the Court is disturbed by the lack of civility the attorneys have demonstrated in their dealings with each other before this Court and the blatant disrespect the attorneys have demonstrated for the Federal Rules, Local Rules, and the Court's orders in this action. Thus, the Court warns the attorneys that any future attempts to delay or obstruct these proceedings, lack of civility in dealings before the Court, violations of the Federal or Local Rules, or violations of the Court's orders will result in sanctions against the responsible attorney.

Appendix E

IT IS SO ORDERED.

Dated: May 9, 2000

s/ William J. Rea
William J. Rea
United States District Judge.

APPENDIX F— TENTATIVE RULING OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED JULY 14, 1997

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TENTATIVE RULING

Case Number: CV 97-0615 WJR (CTx)

Docket Number: 15

Title: ***Eduardo Moreno Laparade v. Columbia Pictures, et al.***

Date: July 14, 1997

Nature of Notion: Defendant Mario *Moreno Ivanova's Motion to* Dismiss' First Amended Complaint; Defendant Ivanova's Motion to Dismiss Columbia's Amended Cross-Claim; Defendant Ivanova's Motion, to Dismiss Cross-Claim of Authors Rights Restoration Corporation.

HON. WILLIAM J. REA, JUDGE

Marva Dillard, Deputy Clerk.

TENTATIVE RULING

The Court is inclined to GRANT defendant Ivanova's motion to dismiss plaintiff's first amended complaint with

prejudice. Regardless of the ultimate effect of the Mexican courts' judgment upon the respective rights of the parties under this Court's 1994 Stipulated Judgment, the initial question as to whether or not Laparade has a valid legal interest in certain motion pictures through contractual transfer has been decided as a final matter by the Mexican courts. Relitigation of that issue in this Court would be entirely inappropriate, and this court has no jurisdiction to allow such relitigation.

The Court is inclined to DENY defendant Ivanova's motion to dismiss the amended cross-claim of defendant Columbia.

The court is inclined to DENY defendant Ivanova's motion to dismiss the cross-claim of the Authors Rights Restoration Corporation.

DISCUSSION

I. Ivanova's Motion to Dismiss Laparade's Complaint.

A. Significance of 1994 Stipulated Judgment.

1. Relevance of 1994 Judgment to Question of Proceeds Distribution.

The 1994 Stipulated Judgment provided that all monies owed to either Moreno Ivanova or to Moreno Laparade were to be paid into an escrow account, and that all proceeds of the account would be paid in the appropriate amounts to the appropriate parties "following the presentation to the escrow

agent of a final judgment in the Mexican proceedings or the joint written instructions to the escrow agent of Moreno Ivanova, Moreno Laparade and the Estate." Stip. Judgm. at ¶¶ 7, 8(d). The escrow agreement further made clear that the monies were being held in escrow "*pending resolution of certain disputes* between the Moreno Ivanova and Moreno Laparade *in the courts of Mexico*." Escrow Agreement, Exhibit A to Motion at 34 (emphases added).

The Stipulated Judgment further provided for retention of jurisdiction by the court "for the *exclusive purpose of the enforcement of that stipulation and this Judgment*." Stip. Judgm. at ¶ 15 (emphasis added).

The Stipulated Judgment clearly contemplated that Laparade's contractual claim for rights to proceeds from certain Moreno Reyes films would be determined in the Mexican courts, and that whether and to what extent Laparade's claim was deemed valid would determine the distribution of proceeds in the Laparade/Ivanova escrow account. The Judgment reserved jurisdiction by this Court only to determine whether or not such prerequisites - i.e., final and nonappealable judgment by a Mexican court - had been fulfilled, and to direct and/or approve the subsequent distribution of funds. The judgment clearly did not reserve jurisdiction for this Court to reexamine the substantive contractual question being litigated in the Mexican courts.

2. Proceeds Dispute vs. Ownership Dispute.

Despite the fact that Columbia is a party to Laparade's underlying complaint only as a defendant, Columbia nonetheless has submitted an opposition to Ivanova's motion

to dismiss Laparade's complaint. It does not appear that Columbia's interest in the matter is antagonistic to Ivanova's interest *to the limited extent* that Ivanova asserts that the Mexican judgment precludes Laparade from asserting a right to the escrow account funds. Indeed, Columbia indicates that its concern essentially exists independent of this Courts determination as to dismissal of Laparade's underlying complaint - so long as this Court does not preclude related litigation which could ultimately lead to an order indicating that claims as to *ownership* of certain films are precluded as inconsistent with the 1994 Stipulated Judgment, and so long as this court dues not dismiss Laparade's underlying complaint on the basis that film *ownership* has been resolved in Ivanova's favor. *See* Columbia Opposition at 7.

Specifically, Columbia evinces concern as to an apparent shift in focus by Laparade and Ivanova from the previous interpleader action. That is, an apparent shift from litigating the issue of *proceeds* to litigating the issue of *ownership*. Columbia expresses concern that this Court might, in dismissing Laparade's action, indicate that the Mexican Courts determined that Ivanova owns the films in question. Columbia further expresses concern that this court might, in dismissing the underlying action and/or relevant cross-claims, preclude Columbia from seeking orders to the effect that claims to *ownership* are barred by the earlier stipulated judgment.

While the court is inclined to dismiss Laparade's underlying complaint, it is inclined to do so on a basis not inconsistent with Columbia's asserted interests at the present time. As far as the Court is concerned, substantive questions

as to ownership, or even as to whether or not the issue or ownership could appropriately be litigated, are simply not before the Court at this time. What is important for purposes of the instant motion to dismiss is that; regardless of whether or not the Mexican proceedings implicated rights to ownership or merely to proceeds, and regardless of whether or not it would be appropriate to recognize and effectuate any Mexican judgment as to ownership as opposed merely to proceeds in this court, the underlying issue upon which Laparade has consistently asserted *any* rights in connection with the subject films - that is, an alleged contractual transfer - has been decided as a final matter in the Mexican courts. Hence, regardless of the ultimate effect of the Mexican proceedings upon the stipulated judgment, and regardless of what elements of those proceedings may or may not appropriately be considered by this Court at a later date, what is clear is that Laparade is precluded, as outlined below, from relitigating the substantive contractual issue litigated and determined in Mexico. This the Court can decide *regardless* of whether the ultimate relief which Laparade now asserts concerns ownership or proceeds. Furthermore, to the extent that Columbia's concerns involve claims of ownership made by parties other than Laparade, including Ivanova, these concerns are more directly addressed below with regard to Ivanova's motions to dismiss certain cross-claims.

B. Significance of Mexican Proceedings.

It is important to keep in mind what is and what is not before the Court at the present time. At present, the Court must determine only whether it has jurisdiction over the substantive issue of whether or not Laparade is contractually

entitled to any rights arising from the subject films pursuant to an alleged agreement between Laparade and Moreno Reyes. While defendant Ivanova suggests that the judgment of the Mexican courts is dispositive both as to this court's lack of jurisdiction, and as to the fact that substantively, Ivanova is entitled to certain rights and proceeds, we simply need not decide the latter question at this juncture. Indeed, the relevant point for purposes of the instant motion, is that regardless of the ultimate effect of the Mexican judgment upon the amount or the rights to which Ivanova is entitled as heir of Moreno Reyes' estate, (regardless of whether, for example, the disputed films are actually part of Moreno Reyes' estate), the Mexican courts *did* determine the underlying issue as to whether or not *Laparade* proffered a successful contractual claim. While this Court may have jurisdiction to determine the effect of that judgment upon the allocation of proceeds (and possibly to determine whether or not any parties have a right to assert claims to film ownership), this Court certainly did not retain, and does not otherwise have, jurisdiction to relitigate that underlying contractual question.

As to the Mexican judgment itself, defendant Ivanova asks, us to take judicial notice of several translated documents from the Mexican courts.[1] These documents make clear that

1. Despite plaintiff's objections to the legitimacy of these translated documents, we find it sufficient for purposes of this motion that defendant has provided the signature and seal of court certified translators attesting to the "true and faithful nature" of the translations, *see* Request for Judicial Notice at ex. 2, p.13; ex. 3, p.1, and that the defendant's attorney has, under implied threat of

(Cont'd)

(1) the collegiate Court, the Supreme Court of Justice of Mexico, vacated the earlier rulings of the trial and intermediate appellate courts in Laparade's favor, and ordered that the lower courts relieve Ivanova of any obligations imposed by those rulings, *see* Request for Judicial Notice at ex. 1, p. 14; (2) the Mexican trial court, upon receiving this directive, issued a new ruling acknowledging the Supreme Courts holding that Laparade's claim should not be vindicated, and releasing Ivanova from any obligations to Laparade pursuant to Laparade's claim, *see* Request for Judicial Notice at ex. 2, p. 23; (3) the ruling of the Collegiate

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(Cont'd)

Rule 11 sanctions, provided a signed statement to the effect that "all of the documents represent official acts of Mexican judicial or legislative authorities. . . ." Request for Judicial Notice at 2. Furthermore, plaintiff nowhere disputes the accuracy of the documents provided, despite the fact that plaintiff would obviously have had access to the original language versions of the translated documents.

As to plaintiff's specific objection under 28 U.S.C. § 1746(1), that statute does not indicate that the precise wording suggested is the exclusive wording which is acceptable for statements of authentication. As to plaintiff's objection under Fed. R. Ev. 901(a) and 902(3), the sworn statements as to the authenticity of the translations would appear to meet the requirements both of Rule 901(a) and 902(3)(A). Furthermore, Rule 902(3) specifically provides that "[i]f reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good shown, order that they be treated as presumptively authentic. . . ." Here, plaintiff clearly has had access to the documents in question, both in their original and translated forms. Hence, the purpose behind the rules here invoked simply is not existent in this case.

court was a final and unappealable *amparo* proceeding. *See* Request for Judicial Notice at ex. 3, p. 33.

Indeed, plaintiff does not substantively dispute any of this history. Plaintiff attempts only to *recharacterize* what occurred, urging us to find that, because judgment was not specifically rendered in Ivanova's favor, no "final judgment" was entered for purposes of resolving the terms of this Court's Stipulated Judgment, and this Court must therefore take jurisdiction to resolve the matter. *See* opposition at 2.

Plaintiff's argument is fundamentally misguided. The Mexican courts clearly reached a final and nonappealable decision to the effect that Laparade's claim to rights connected to certain films on account of an alleged contractual transfer should not be vindicated. That is all this Court need recognize at the present time. What effect, if any, this judgment has upon Ivanova's rights under the Stipulated Judgment will likely be determined at a later date. What *is* clear is that Laparade's rights have been fully and finally adjudicated in the Mexican courts. Hence, whatever the effect of the Mexican Judgment upon Ivanova's rights, and to whomever any rights *not* accorded Laparade may or may not belong – it is clear that the basis upon which Laparade seeks proceeds (or ownership) under the Stipulated Judgment *has* been adjudicated against Laparade. Thus, while it may or may not be left to a later date to determine who will receive the rights to which Laparade is not entitled, and what rights those may be – it is clear that Laparade himself has no further place in this action, pursuant to a final judgment of the Mexican courts.

C. Res Judicata Principles Bar Relitigation of the Issue Determined by the Mexican Courts.

"In order to bar a suit under the doctrine of res judicata, an adjudication must (1) involve the same 'claim' as the later suit, (2) have reached a final judgment on the merits, and (3) involve the same parties or their privies." *Nordhorn v. Ladish Co., Inc.*, 9 F.3d 1402, 1404 (9th Cir. 1993), *citing Blonder-Tongue Laboratories v. University of Illinois Foundation*, 402 U.S. 313, 323-24 (1971). The doctrine of res judicata can serve to bar the filing of suit in an American court where a final judgment was reached in a court of foreign jurisdiction. *See, e.g., Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 927 (D.C. Cir. 1984).

As noted above, the Mexican courts reached a final and nonappealable judgment on precisely the issue which plaintiff seeks to litigate again in this Court – that is, whether or not plaintiff has rights relating to films in question as the result of a contractual transfer. Indeed, even to the extent that Laparade requests relief different from that referred to in the earlier Stipulated Judgment, (i.e., ownership vs. proceeds), Laparade's complaint makes clear that the factual and legal basis underlying the instant claim is the same as that litigated in the Mexican proceedings – the very proceedings referred to in the Stipulated Judgment. *See* Complaint at ¶ 10. Laparade argues only that the Mexican judgment was not "final," and that the issue thus should be relitigated. *Id.* As indicated above, the Court disagrees with Laparade's characterization of the Mexican proceedings. Hence, plaintiff is now barred from relitigating the question of whether he is entitled, through contractual transfer, to *any* rights, or proceeds in the subject films.

D. This Court Does Not Have Jurisdiction Over Plaintiff's Complaint.

As noted above, the Stipulated Judgment provided for retention by this Court of jurisdiction "for the *exclusive purpose of the enforcement of that Stipulation and this Judgment.*" Stip. Judgm. at ¶ 15 (emphasis added). This may well entail, as discussed above, determination of the significance of the Mexican courts' determination with regard to who shall receive rights to which Laparade was deemed not entitled. It does not, however, entail a revisiting of the underlying substantive issue which was specifically reserved for the Mexican courts, *see* Stip. Judgm. at ¶¶ 7, 8(d), and which, regardless of any ambiguity or lack thereof as to its ultimate ramifications, was determined by the Mexican courts. Hence, the Stipulated Judgment cannot be relied upon as a basis for jurisdiction.

Given that the Stipulated Judgment cannot be relied upon as a jurisdictional basis, it is clear that no legitimate basis for jurisdiction exists. Even when Laparade's argument as to "proper alignment of parties" is considered, it is clear that Laparade remains a plaintiff and Ivanova remains a defendant in the action filed by Laparade. As defendant points out, this destroys complete diversity, as there are Mexican defendants on both sides of the case. *See* 28 U.S.C. § 1332(a)(2); *Faysovad Ltd. v. United Coconut Chem., Inc.*, 878 F.2d 290, 294 (9th Cir. 1989); *Cheng v. Boeing Co.*, 708 F.2d 1406, 1412 (9th Cir. 1983).

The only other jurisdictional basis alleged in plaintiff's complaint is under the Declaratory Judgment Act. Despite

plaintiff's arguments to the effect that this Act "bolsters" the argument for jurisdiction, *see* Opposition at 8-9, the fact remains that the Declaratory Judgment Act does not provide an independent source of subject matter jurisdiction. *See Staacke v. U.S. Secretary of Labor*, 841 F.2d 278, 280 (9th Cir. 1988), *citing Fidelity & Casualty Co. v. Reserve Insurance Co.*, 596 F.2d 914, 916 (9th Cir. 1979).

Finally, plaintiff argues in his opposition, although he did not allege as much in his complaint, that supplemental and ancillary jurisdiction exist in the instant action. To begin with, plaintiff is incorrect in analyzing the two concepts as though they are distinct from one another. 28 U.S.C. § 1367 "codifies under the name of 'supplemental jurisdiction' the caselaw doctrines of 'pendent' and 'ancillary' jurisdiction . . . ." *See* 28 U.S.C. § 1367 (West 1993) (practice commentary). Hence, supplemental jurisdiction is the only appropriate basis for argument, as § 1367 codifies both ancillary and pendant jurisdiction under the umbrella of supplemental jurisdiction. More importantly, as substantive matter, supplemental jurisdiction would not exist over Laparade's complaint even if the complaint were not already barred by the doctrine of res judicata. Given, as discussed above, that relitigation of Laparade's substantive contractual claim is not necessary to "vindicate [the Court's] authority," *see Kokkonen v. Guardian Life Insurance Co.*, 128 L. Ed. 2d 391, 397 (1994), but would in fact run counter to that end, and given that Laparade seeks to attach itself to the supplemental jurisdiction of an earlier case which did not leave open the underlying question now sought to be adjudicated, supplemental jurisdiction would be entirely inappropriate. *Id.* (finding an asserted factual relationship to

an earlier case insufficient to establish supplemental jurisdiction).

E. Dismissal as to Laparade's Claim Should Be With Prejudice, as Plaintiff's Sole Basis for Suit Was Already Adjudicated by the Mexican Courts.

As detailed above, Laparade's sole basis for existence in this litigation, as made clear by the 1994 Stipulated Judgment, was based upon contractual rights asserted by Laparade, and since litigated in the Mexican courts. Given our inclination to dismiss Laparade's claim on the basis of the res judicata effect of the Mexican decision, in addition to our lack of independent subject matter jurisdiction, dismissal of Laparade's complaint should be with prejudice.

II. Ivanova's Motions to Dismiss Cross-Claims.

A. Case by Case Determination as to the Propriety of Individual Cross-Claims is Appropriate in Light of the Court's Inclination to Dismiss the Underlying Complaint.

As an initial matter, it should be noted that dismissal of the cross-claims and counterclaims in the instant case is not a foregone conclusion simply on the basis of the Court's inclination to dismiss Laparade's underlying complaint. "Dismissal of the original suit ... for lack of subject matter jurisdiction will require the court also to dismiss the cross-claim, *unless* that claim is supported by an independent basis for federal jurisdiction." *See* Wright & Miller, Federal Practice and Procedure, Vol. 6, § 1433, p. 258 (1990). Given

that Ivanova brings the instant motions to dismiss two cross-claims concurrently with his motion to dismiss the underlying complaint, we are now free to make an independent determination as to whether or not each of the two cross-claims at issue should remain within the Court's jurisdiction, despite the dismissal of the underlying complaint.

B. Motion to Dismiss Columbia's Cross-Claims.

The Court is inclined to find that, independent of the underlying Laparade complaint, the Court has jurisdiction over Columbia's Cross-Claims and Counterclaims, and thus is inclined to permit those Cross-Claims and Counterclaims to proceed.

Specifically, the Court finds that the claims asserted by Columbia fall within the realm of determinations which this Court specifically maintained jurisdiction to make, pursuant to its reservation of jurisdiction "for the exclusive purpose of the enforcement of that Stipulation and this Judgment." Stip. Judgm. at ¶ 15. It indeed appears that the Stipulated Judgment was at least arguably premised upon the notion that Columbia owned the rights to the subject films, with the sole question for this Court's determination how much and to whom past, present and future royalties were owed by Columbia. At the very least, Columbia appears to be correct in asserting that, if newly raised claims to complete film ownership were to be vindicated, it could invalidate this Court's allocation of future royalties by Columbia in its Stipulated Judgment.

Furthermore, as noted above with regard to Ivanova's motion to dismiss Laparade's underlying complaint, it is not at all clear that the Stipulated Judgment reserved the issue of whether or not Ivanova *owned* the subject films for determination by the Courts of Mexico, nor are the ultimate ramifications of the Mexican judgment clear with respect to ownership – and certainly not with respect to its ultimate effect upon the Stipulated Judgment. Hence, if Ivanova is now claiming ownership of the films pursuant to the Mexican judgment, and if any other parties are now claiming ownership of the films, it is clear that this Court has jurisdiction pursuant to the Stipulated Judgment to determine, at the very least, whether litigation as to such ownership claims is even appropriate at this juncture, or is barred by the Stipulated Judgment. Hence, the Court is inclined to maintain jurisdiction over Columbia's cross-claim, despite its inclination to dismiss Laparade's underlying complaint.

C. Motion to Dismiss ARRC's Cross-Claims.

The Authors Rights and Restoration Corporation ["ARRC"] also brings, in its answer to Ivanova's cross-claim, its own counterclaims and cross-claims. Ivanova seeks to dismiss the cross-claims raised against him by ARRC. For reasons similar to those enumerated above with respect to Columbia's interpleader counterclaim/cross-claim, we are inclined to maintain jurisdiction over ARRC's cross-claims against Ivanova.

First of all, as ARRC brings its cross-claim for determination of copyright ownership under the United States Copyright Act, an independent basis for federal jurisdiction exists.

Second, and perhaps most importantly, the Court is inclined to find that determination of ARRC's claim falls within the realm of issues contemplated by the Court's reservation of jurisdiction over matters related to the "enforcement of [the Stipulated] Judgment." Stip. Judgm. at ¶ 15. At the very least, as noted above, the question of whether or not the parties now asserting ownership interests have a right to assert these interests under the Stipulated Judgment, does indeed fall within the realm of issues related to enforcement of that judgment. Given the effect that conflicting ownership claims could obviously have upon the Stipulated Judgment's determination with respect to Columbia's obligation to distribute proceeds, it is important that such claims be resolved in this Court. Hence, Ivanova's *forum non conveniens* claim is unavailing, as is his assertion that jurisdiction does not exist pursuant to the Stipulated Judgment.

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED JANUARY 11, 2005

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 02-56222

D.C. No. CV-97-00615-WJR

EDUARDO MORENO LAPARADE,

Plaintiff-counter-defendant,

v.

MARIO MORENO IVANOVA, and individual & as Executor of the Estate of Mario Moreno Reyes;

Defendant-cross-defendant-Appellant,

COLUMBIA PICTURES INDUSTRIES, INC., a California corporation,

Defendant-counter-claimant-cross-claimant-Appellee.

Appendix G

No. 03-56207

D.C. No. CV-03-01033-DT

MARIO MORENO IVANOVA; ESTATE OF MARIO MORENO REYES (A/K/A CANTINFLAS);

Plaintiffs-Appellants,

TIMOTHY CHARLES RILEY, Esq.,

Appellant,

v.

COLUMBIA PICTURES INDUSTRIES, INC., a Delaware Corporation,

Defendant-Appellee.

Before: THOMPSON, SILVERMAN, and WARDLAW, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the petition for panel rehearing filed by Mario Moreno Ivanova and the Estate of Mario Moreno Reyes ("appellants"). Judges Silverman and Wardlaw have also voted to deny the appellants' petition for rehearing by the court en banc, and Judge Thompson has recommended denial of that petition.

Appendix G

The full court has been advised of the petition for court rehearing en banc, and no judge of the court has requested en banc rehearing. See Fed. R. App. P. 35(b).

The petitions for panel rehearing and for rehearing by the court en banc are DENIED.

The motion filed by Mexican Institute of Cinematography for leave to file an amicus curiae brief is DENIED.

APPENDIX H — WARRANT FOR ARREST FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED JULY 11, 2003

2003

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EDUARDO LAPARADE
Plaintiff(s)

v.

Columbia Pictures, Inds. Inc
Defendant(s)

CASE NUMBER: CV 00-615-WJR (CTx)

WARRANT FOR ARREST

TO: UNITED STATES MARSHAL AND ANY AUTHORIZED UNITED STATES OFFICER

YOU ARE HEREBY COMMANDED to arrest MARIO Arturo MORENO IVANOVA aka Mario MORENO and bring him/her forthwith to the nearest Magistrate Judge to answer a(n): ☐ Complaint ☐ Indictment ☐ Information ☒ Order of Court ☐ Probation Violation Petition ☐ Violation Notice charging him/her with: (ENTER DESCRIPTION OF OFFENSE BELOW)

FAILure to comply with the permanent Injunction and the March 31, 2003 and April 28, 2003 Court Orders.

in violation of Title 18 United States Code, Section(s) 3146(a)(1)

Sheri R. Carter
NAME OF ISSUING OFFICER

Clerk of Court
TITLE OF ISSUING OFFICER

SIGNATURE OF DEPUTY CLERK

—0—
BAIL FIXED AT

U.S. Courthouse, 312 No. Spring Street, L.A. CA
DATE AND LOCATION OF ISSUANCE

BY: WILLIAM J. REA
NAME OF JUDICIAL OFFICER

RETURN

THIS WARRANT WAS RECEIVED AND EXECUTED WITH THE ARREST OF THE ABOVE-NAMED DEFENDANT AT (LOCATION):

DATE RECEIVED

NAME OF ARRESTING OFFICER

DATE OF ARREST

TITLE

DESCRIPTIVE INFORMATION FOR DEFENDANT CONTAINED ON PAGE TWO

SIGNATURE OF ARRESTING OFFICER

WARRANT FOR ARREST

CR-13 (12/02)

PAGE ONE

SER 1106

Appendix H

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EDUARDO LAPETRADE
Plaintiff(s)

v.

Columbia Pictures, Inds. Inc
Defendant(s)

CASE NUMBER: CV00-615-WJR (CTx)

WARRANT FOR ARREST

ADDITIONAL DEFENDANT INFORMATION

RACE:	SEX:	HEIGHT:	WEIGHT:	HAIR:	EYES:	OTHER:	
DATE OF BIRTH:		PLACE OF BIRTH:		SOCIAL SECURITY NO.		DRIVER'S LICENSE NO.	ISSUING STATE
ALIASES:		SCARS, TATTOOS OR OTHER DISTINGUISHING MARKS:					
AUTO YEAR:	AUTO MAKE:	AUTO MODEL:		AUTO COLOR:		AUTO LICENSE NO.	ISSUING STATE
LAST KNOWN RESIDENCE:				LAST KNOWN EMPLOYMENT:			
FBI NUMBER: ADDITIONAL INFORMATION:							
INVESTIGATIVE AGENCY NAME:				INVESTIGATIVE AGENCY ADDRESS:			

NOTES:

SEE ATTACHED FOR ADDITIONAL INFORMATION

Appendix H

-v-

Columbia Pictures Indo, Inc.

THE FOLLOWING IS FURNISHED FOR INFORMATION ONLY:

DEFENDANT'S NAME: Mario Arturo Moreno Ivanova

ALIAS: Mario Moreno

LAST KNOWN RESIDENCE: Loma Linda, Vista Hermosa, Mexico City, Mexico 05100

LAST KNOWN EMPLOYMENT: none

PLACE OF BIRTH: Mexico (?)

DATE OF BIRTH: 1960

SOCIAL SECURITY NUMBER: Mexican Taxpayer ID: MOIM 600901

HEIGHT: 6'0" WEIGHT: 300+ lbs.

SEX: M RACE: Hispanic/Caucasian

HAIR: Blond/Light Brown EYES: Hazel

SCARS, TATTOOS, OTHER DISTINGUISHING MARKS: none

FBI NUMBER: n/a

COMPLETE DESCRIPTION OF AUTO: n/a

INVESTIGATIVE AGENCY AND ADDRESS:

FILED
JUL 7 - 2005
OFFICE OF THE CLERK

No. 04-1379

IN THE

Supreme Court of the United States

MARIO MORENO IVANOVA, individually and as Executor of THE ESTATE OF MARIO MORENO REYES,

Petitioner,

v.

COLUMBIA PICTURES INDUSTRIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

TIMOTHY C. RILEY
LAW OFFICE OF TIMOTHY C. RILEY
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TABLE OF CONTENTS

Page

Table of Cited Authorities ii

Summary of Grounds for the Petition for Rehearing 1

History of Proceedings Relevant to this Petition ... 3

A. The Death of Cantinflas and the First Series of Lawsuits 3

B. The Reyes Estate Prevails in the Mexican Litigation and the Case at Bar is Filed 4

C. The District Court Clarifies that It Was Not Acting Under Copyright Act Jurisdiction ... 6

D. The District Court Issues an Arrest Warrant When the Estate Challenges Its Subject Matter Jurisdiction 8

Reasons for Granting the Petition 9

Conclusion 10

TABLE OF CITED AUTHORITIES

Page

Cases:

In re Hern Ironworks, 881 F.2d 722 (9th Cir. 1989) 8

Mitchell v. Maurer, 293 U.S. 237 (1934) 10

Silber v. United States, 370 U.S. 717 (1962) 2

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) 1, 9

United States v. Atkinson, 297 U.S. 157 (1936) 3

Statutes:

17 U.S.C. § 104A 1, 2, 6, 7, 9

17 U.S.C. § 1338(a) 1, 3, 9, 10

Rule:

Supreme Court Rule 24.1(a) 2, 3

Petitioner respectfully moves the Court for an order (1) vacating the denial of the petition for writ of certiorari entered on June 13, 2005 and (2) granting the petition.

SUMMARY OF GROUNDS FOR THE PETITION FOR REHEARING

On April 11, 2005, Petitioner, filed a petition for writ of certiorari seeking review of the November 5, 2004 ruling of the United States Court of Appeal for the Ninth Circuit dismissing its appeal on the basis of the fugitive disentitlement doctrine. This dismissal was premised upon an arrest warrant that was issued by the district court when Petitioner distributed the films *El Patrullero 777* and *El Berrendero* in Mexico in violation of an injunction that ostensibly prohibited that extraterritorial conduct. At the time of the arrest warrant, the Petitioner's appeal from the district court's rulings had been pending for 1 year. The appeal raised numerous issues including lack of subject matter jurisdiction. Before the Ninth Circuit could consider the motion to dismiss, it had to first determine that the district had subject matter jurisdiction over the underlying action brought against Petitioner. The requirement that jurisdiction be established as a threshold matter "springs from the nature and limits of the judicial power of the United States" and is "inflexible and without exception." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).

The Ninth Circuit found that the district court had subject matter jurisdiction under 17 U.S.C. § 104A (the copyright restoration statute) and 17 U.S.C. § 1338(a). *Pet. App. 7a.*[1] This was plain error of the type that "seriously affect the

1. The references to "*Pet. App.*" are to the appendix of the initial April 11, 2005 Petition filed herein. The other references to documents are either to the Appellant's Excerpts of Record before the Ninth Circuit or to the records in the docket of the district court.

fairness, integrity and public reputation" of the proceedings and which can be corrected by this Court at any stage in the proceeding under Supreme Court Rule 24.1(a). *See Silber v. United States*, 370 U.S. 717 (1962).[2] Columbia never alleged Copyright Act jurisdiction in its April 28, 1997 Counterclaim, the matter that went to trial. *See April 28, 1997 Counterclaim, Ninth Circuit Excerpt of Record 75*. Likewise, the original complaint as to which Columbia counterclaimed did not allege Copyright Act jurisdiction. *See April 22, 1997 Complaint of Eduardo Laparade, Ninth Circuit Excerpt of Record 74*. Moreover, in a key post-trial order the district court expressly ruled that the matter before him was a contract action and *not* a matter arising under the Copyright Act. As a consequence, the district court expressly ruled that he had not and would not rule on ownership of restored U.S. Copyrights under 17 U.S.C. § 104A. *See October 29, 2002 Order re Third Phase of Trial, Ninth Circuit Excerpt of Record 116.* As the district court expressly stated in that post-trial order: "The decision is an interpretation of the contracts as to what rights they attempt to grant, it does not in any way attempt to interpret the copyright act."

---

2. The Ninth Circuit also found that the district court had personal jurisdiction because the Reyes Estate actively participated in the trial. *Pet. App. 7a.* The Reyes Estate raised lack of subject matter and personal jurisdiction in pre-answer motions to dismiss brought in the trial court on April 4, 1997, April 25, 1997, June 3, 1997, June 16, 1997 and June 18, 1997. The motions were held in abeyance while the district court action was stayed in deference to certain Mexican proceedings involving copyright ownership of the Mexican films at issue. *See August 29, 1997 Order Staying Proceedings Pending Final Disposition of Courts of Mexico, Ninth Circuit Excerpt of Record 78* . When that stay was lifted, the Reyes Estate brought another pre-answer motion to dismiss on grounds of lack of personal and subject matter jurisdiction on February 4, 2000. *See Motion to Dismiss, Ninth Circuit Excerpt of Record 126.* The district court denied the motion and ordered that the Reyes Estate to answer. The Reyes Estate answered on May 1, 2000 asserting lack of personal jurisdiction as an affirmative defense. *See Answer of Reyes Estate, District Court Docket No. 216.*

Under Rule 24.1(a), this Court may correct plain error such as that presented herein even if the issue was not addressed in the initial petition for certiorari. This Court limits its power to notice such plain error to situations where the error "seriously affects the fairness, integrity or public perception" of the proceedings. *United States v. Atkinson*, 297 U.S. 157, 160 (1936). The Ninth Circuit incorrectly grounded subject matter jurisdiction upon a basis that was not alleged by Columbia and expressly rejected by the district court. Under Supreme Court Rule 10, compelling reasons may be found to grant certiorari where a court of appeal "has so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power."

Petitioner respectfully requests that the Court vacate its order denying the petition for writ of certiorari entered on June 13, 2005 and that it summarily reverse the plainly incorrect finding of the Ninth Circuit that the district court had subject matter of the contract action in question under 17 U.S.C. § 1338(a).

HISTORY OF PROCEEDINGS RELEVANT TO THIS PETITION

A. The Death of Cantinflas and the First Series of Lawsuits

This case involves 34 Mexican films produced by and starring the late Mario Moreno Reyes, better known as "Cantinflas." Columbia was the long-time distributor of the 34 films. After the death of Reyes, a nephew who had been excluded from the will, Eduardo Laparade, came forward with a purported death bed grant whereby Reyes allegedly transferred the copyrights to the films to him. Laparade filed a lawsuit in Mexico seeking a declaration that he rather than the Reyes Estate was "the sole and legitimate owner and

holder of copyrights" to the films." *See Laparade v. Mario Moreno Reyes Su Sucesion, Case No. 415/93A, Ninth Circuit Excerpt of Record 67-68.*

At the same time, Columbia brought a 1993 Interpleader action seeking direction regarding payment of the producer's share of the proceeds from its distribution. The Reyes Estate was never served but it made a voluntary appearance to execute a settlement agreement that permitted Columbia to distribute the 34 films during the pendency of the Mexican lawsuit. The Reyes Estate made this appearance only after the other parties explicitly agreed and stipulated that its appearance could not be used as the jurisdictional basis for any further lawsuits in the United States. The settlement agreement – including the jurisdictional bar – was entered as a Stipulated Judgment by the district court in the 1993 Interpleader action. *See 1994 Stipulated Judgment, Case No. CV-93-4969 WJR, Ninth Circuit Excerpt of Record 70.*

The settlement agreement permitted Columbia to distribute the films to the extent that it had rights under the historical distribution contracts. *See 1994 Stipulated Judgment, Par. A and Par. 3.*

B. The Reyes Estate Prevails in the Mexican Litigation and the Case at Bar is Filed

In a case that went to the highest Mexican civil appellate court, the Reyes Estate prevailed in the Mexican ownership litigation and it was declared the owner of the copyrights to the 34 films.[3] Thereafter Laparade brought the present action in the Central District of California against the Reyes Estate

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3. *See June 20, 1996 Opinion of Mexico's First Circuit Tribunal, Ninth Circuit Excerpts of Record 71-73* and *Order of Judge Eighteen of Mexico City Federal District, Case No. 135/97 B, Ninth Circuit Excerpts of Record 79-80.*

and Columbia seeking a declaration from that he was the sole owner of the 34 films. As a counterclaim, Columbia brought the action that would go to trial in the district court. In that case Columbia sought a declaration at trial that it was the owner under United States common law of all worldwide rights in 26 of the pictures. As to the other 8 Pictures, Columbia admitted before trial that its limited distribution rights had expired and it sought a declaration that before the Reyes Estate could exploit those films, it owed Columbia a right of first refusal.

The Reyes Estate sought dismissal of both actions on jurisdictional grounds.[4] The district court dismissed the Laparade action but it permitted Columbia's 1997 action to go forward based upon its finding that "it appears that the [1994] Stipulated Judgment was at least arguably premised upon the notion that Columbia owned the rights to the subject films." *Pet. App. 70a.* The 1994 Stipulated Judgment did not once use the words "own" or "ownership" and, once again, it stated in the first paragraph that it could not as the jurisdictional basis for any further lawsuits.[5]

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4. As addressed above, the Reyes Estate raised lack of subject matter and personal jurisdiction in pre-answer motions to dismiss brought in the trial court on April 4, 1997, April 25, 1997, June 3, 1997, June 16, 1997 and June 18, 1997. The motions were held in abeyance while the district court action was stayed in deference to certain Mexican proceedings involving copyright ownership of the Mexican films at issue. *See August 29, 1997 Order Staying Proceedings Pending Final Disposition of Courts of Mexico, Ninth Circuit Excerpt of Record 78.* When that stay was lifted, the Reyes Estate brought another pre-answer motion to dismiss on grounds of lack of personal and subject matter jurisdiction on February 4, 2000. *See February 4, 2000 Motion to Dismiss, Ninth Circuit Excerpt of Record 126.*

5. Paragraph 2 of the Stipulated Judgment provided:

> Mario Moreno Ivanova . . . hereby appear[s] specially and solely for the limited purpose of giving jurisdiction to this Court to enter judgment pursuant to the terms of this

(Cont'd)

Against the jurisdictional challenges of the Reyes Estate, the Columbia counterclaim went to trial from February 26 to March 19, 2002. Underlying the cases was the undisputed fact that most of the films were in the public domain in the United States and copyrights were restored to the "author" or "initial rightholder" as determined by Mexican law. 17 U.S.C. § 104A. Because of this, Columbia never alleged Copyright Act jurisdiction and it never sought a declaration of copyright ownership. It instead sought a declaration that it owned worldwide rights in 26 of the films under U.S. common law contract principles.

Following a bench trial conducted over the objection of the Reyes Estate, the district court ruled that Columbia was the owner of all "Film Rights" in 26 of the pictures. *Pet. App. 24(a) and 25(a).* In post-trial briefing, Columbia asked the district court not to rule on it claim of first refusal rights in the remaining 8 pictures but instead to rule that the Reyes Estate – the defendant – had no rights in those films. The district court did this and it enjoined the Reyes Estate's distribution of the 8 pictures on the basis that the Estate "has not established any right to distribute the 8 Motion Pictures." *Pet. App. 26(a).*

C. The District Court Clarifies that It Was Not Acting Under Copyright Act Jurisdiction

Following the trial, Columbia requested that the district court rule that it implicitly found that Columbia was the owner

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(Cont'd)

> stipulation ("the Judgment") and for the enforcement of this stipulation and the Judgment. The parties covenant and agree individually and by their respective attorneys that this special appearance shall not be deemed consent to general jurisdiction by [the Reyes Estate] in this action or any other action, nor a waiver of [the Reyes Estate's] claim of lack of jurisdiction with regard to any other action or proceeding already on file, or which may be filed, in the State of California.

of the restored U.S. Copyrights in the films under 17 U.S.C. § 104A when it ruled that Columbia owned the "Film Rights" in the 26 films. In a key October 29, 2002 Order, the district ruled that Columbia's case was a contract action and that he had not ruled on ownership of the restored copyrights implicitly or otherwise. *See October 29, 2002 Order re Third Phase of Trial, Ninth Circuit Excerpt of Record 116.* The district court stated therein:

> The Court does not rule "implicitly." The Court made no findings with respect to copyright in the second phase... The decision is an interpretation of the contracts as to what rights they attempt to grant, it does not in any way attempt to interpret the copyright act. Furthermore, the Court made clear that (U.S. copyright) restoration issues were not tried in its tentative ruling on [the Reyes Estate] Motion for New Trial . . . Columbia's argument which has been accepted by the Court is that all of the dispute can be resolved by an interpretation of the contract. In *Franklin v. Cannon Films, Inc.*, 654 F. Supp. 133 (C.D. CA 1987), this district held that it does not have jurisdiction over an action merely because it involves in some way a copyright or simply because a copyright is the subject of a contract.

In late 2002, the Reyes Estate licensed the films *El Patrullero 777* and *El Berrendero* for DVD release in Mexico. These were 2 of the 8 films as to which Columbia's limited distribution rights had expired. Again, the only claim that Columbia pursued in regard to these films was a claim that the Reyes Estate owed it a right of first refusal – a claim which the district court never ruled upon. The Reyes Estate licensed these films in Mexico to raise $20,000 that was needed for an emergency surgery for one of the grandsons of

Mario Moreno Reyes. *March 19, 2003 Declaration of Mario Moreno Ivanova, Ninth Circuit Excerpt of Record 187.*

D. The District Court Issues an Arrest Warrant When the Estate Challenges Its Subject Matter Jurisdiction

Even though Columbia had effectively abandoned its claims to distribution rights to *El Patrullero 777* and *El Berrendero*, it asked the district court to hold the Reyes Estate in contempt for this Mexican licensing activity. The district court held the Reyes Estate finding that "the absence of prejudice to Columbia does not excuse [the Estate's] failure to comply with this Court's order." *April 11, 2003 Contempt Order, Ninth Circuit Excerpt of Record 188, p. 5.* As a contempt sanction the district court ordered that all film elements for the 34 films be turned over to the court. *Id., p. 6.* The district court also imposed an escalating fine of $340 per day – doubling each week – until the Reyes Estate complied with its order. *April 28, 2003 Contempt Order, Ninth Circuit Excerpt of Record 191, p. 6.* Those fines are now in excess of $10,000,000.

Relying upon clear Ninth Circuit authority, the Reyes Estate informed the district court that the injunction regarding the 8 pictures was issued without any colorable jurisdiction and that it was entitled to violate the injunction while it sought review of the flimsy jurisdictional underpinnings. *See in re Hern Ironworks*, 881 F.2d 722, 726-27 (9th Cir. 1989) ([if the issuing court lacks subject-matter jurisdiction over the underlying controversy "its order may be violated with impunity . . . in such a case, the original order is deemed a nullity, and the accused contemnor cannot be fairly punished for violating nothing at all."]

When the Reyes Estate continued to stand on its rights under *Hern Ironworks*, the district court issued an arrest

warrant for the purpose of "provid[ing] the Ninth Circuit with grounds to dismiss [the Estate's] now-pending appeal in this action" under the fugitive disentitlement doctrine. *June 26, 2003 Contempt Order, Ninth Circuit Excerpt of Record 195, p. 9.*

Columbia thereafter brought a motion to dismiss the appeal of the Reyes Estate based upon the fugitive disentitlement doctrine. As addressed earlier, the Ninth Circuit first reviewed personal and subject matter jurisdiction. The Ninth Circuit found that the district court had personal jurisdiction because the Reyes Estate voluntarily participated in the trial. It also found that the district court had subject matter jurisdiction over Columbia's contract common law contract claims pursuant to 17 U.S.C. § 104A (the copyright restoration statute) and 17 U.S.C. § 1338(a). *Pet. App. 7a.*

REASONS FOR GRANTING THE PETITION

Before the Ninth Circuit could even consider Columbia's motion to dismiss it had to first make a rigorous inquiry regarding subject matter jurisdiction. If subject matter jurisdiction was lacking, the only power that the Ninth Circuit had was to announce that fact and dismiss the cause. As this Court explained in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998):

> Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. *Ex parte McCardle*, 74 U.S. 506, 7 Wall. 506, 514, 19 L. Ed. 264 (1869). "On every writ of error or appeal, the first and fundamental question is that

> of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." *Great Southern Fire Proof Hotel Co. v. Jones*, *supra*, 177 U.S. 449 at 453. The requirement that jurisdiction be established as a threshold matter "springs from the nature and limits of the judicial power of the United States" and is "inflexible and without exception." *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382, 28 L. Ed. 462, 4 S. Ct. 510 (1884).

Every federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review." *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). Again, the Ninth Circuit recognized this duty and attempted to discharge the duty by finding that the district court had jurisdiction over Columbia's cause under the Copyright Act. As addressed herein this was a jurisdictional basis never alleged by Columbia. Moreover, the district court ruled *explicitly* that the matter before it was a contract action that did not arise under the Copyright Act. It is difficult to imagine a more palpable case of "clear error."

CONCLUSION

Petitioner respectfully requests that this Court vacate its order denying the petition for writ of certiorari entered on June 13, 2005 and that it summarily reverse the plainly incorrect finding of the Ninth Circuit that the district court had subject matter of the contract action in question under 17 U.S.C. § 1338(a). The Ninth Circuit should be required to articulate a basis for subject matter jurisdiction that the district court itself did not explicitly reject.

Respectfully submitted,

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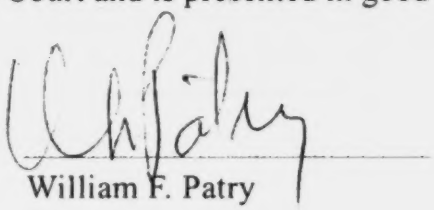
CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this petition for rehearing is restricted to the grounds specified in Rule 44.2 of the Rules of the Supreme Court and is presented in good faith and not for delay.



William F. Patry

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No. 04-1379

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

MARIO MORENO IVANOVA, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF MARIO MORENO REYES,
Petitioner,

v.

COLUMBIA PICTURES INDUSTRIES, INC.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Brief *Amici Curiae* of the Government of the United Mexican States, Joined by the Mexican Institute of Cinematography and La Asociación de Productores y Distribuidores de Películas Mexicanas

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
BRIEF *AMICI CURIAE* 1
INTEREST OF *AMICI* 1
STATEMENT 2
I. The 1993 Interpleader Action Producing the Stipulated Judgment 3
II. The 1997 Litigation 4
ARGUMENT 11
I. Foreign Nationals Such as Petitioner Have the Right to Appellate Review 12
II. Certiorari Is Warranted Because the Fugitive Disentitlement Doctrine Was Improperly Applied to Petitioner's Case. 15
A. Petitioner Cannot Be Deemed a Fugitive. 15
B. Dismissal of Petitioner's Appeal Does Not Serve Any of the Purposes of the Fugitive Disentitlement Doctrine. 17
CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Caesars World, Inc. v. *Milanian*, Nos. 03-16063 & 03-16685, 2005 U.S. App. LEXIS 1533 (CA9 Feb. 1, 2005) (mem.) 17
Chambers v. *NASCO, Inc.*, 501 U.S. 32 (1991) 13
Degen v. *United States*, 517 U.S. 820 (1996)..... 17, 18, 19, 20
FDIC v. *Pharaon*, 178 F.3d 1159 (CA11 1999)..... 18
Federal Ins. Co. v. *Maine Yankee Atomic Power Co.*, 311 F.3d 79 (CA1 2002)..... 13
Link v. *Wabash R.R. Co.*, 370 U.S. 626 (1962)..... 13
March v. *Levine*, 249 F.3d 462 (CA6 2001), cert. denied, 534 U.S. 1080 (2002)..... 16
Motorola Credit Corp. v. *Uzan*, 115 Fed. Appx. 473 (CA2 Oct. 22, 2004) 16
Olson v. *United States*, 872 F.2d 820 (CA8 1989)..... 13
Ortega-Rodriguez v. *United States*, 507 U.S. 234 (1993)..... 20
SEC v. *Winburn*, Nos. 98-5183 & 98-5235, 1999 U.S. App. LEXIS 4001 (CADC Feb. 3, 1999) (per curiam) 16
Smith v. *United States*, 94 U.S. 97 (1876)..... 19
United States Catholic Conference v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988)..... 13
United States v. *Barnette*, 129 F.3d 1179 (CA11 1997)..... 16

Statutes

28 U.S.C. 1291..... 12
28 U.S.C. 1335..... 5
28 U.S.C. 1367(a)..... 5

Other Authorities

Office of the U.S. Trade Rep., *NAFTA: A Decade Of Success*, *available at* http://www.ustr.gov/Document_Library/Fact_Sheets/2004/NAFTA_A_Decade_of_Success.html (visited May 9, 2005) 12

BRIEF *AMICI CURIAE*

The Government of the United Mexican States, joined by the Mexican Institute of Cinematography and La Asociación de Productores y Distribuidores de Películas Mexicanas, submits this *amici curiae* brief in support of petitioner Mario Moreno Ivanova, individually and as executor of the estate of Mario Moreno Reyes.[1]

INTEREST OF *AMICI*

Amicus the Government of the United Mexican States has a substantial interest in this case because it involves a Mexican citizen, residing in Mexico, who – after being held in contempt of court for conduct that occurred solely in Mexico and was indisputably legal there – was deemed a fugitive in the United States for the express purpose of precluding his appeal from the judgment against him. *Amicus* is concerned that the decision below creates a general rule that the "fugitive disentitlement doctrine" may be broadly applied to insulate from appellate review rulings against Mexican citizens who dispute the jurisdiction of U.S. courts and thus decline to comply with orders by those courts. More generally, and although this issue is not directly presented by the petition for certiorari, *amicus* is also gravely concerned about the underlying judgment itself, in which a U.S. court granted a U.S. corporation worldwide ownership rights in certain Mexican films and, on the basis of that ruling, impermissibly enjoined activity in Mexico by the Mexican copyright holder of those films. Such a result, *amicus* respectfully submits, constitutes an intrusion to Mexico's sovereignty. Appellate review of that ruling is thus essential,

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[1] No person other than *amici* and their counsel participated in the writing of this brief or made a financial contribution to the brief. S. Ct. R. 37.6. The letters signifying the parties' consent are on file with this Court.

but has been precluded by the Ninth Circuit's misapplication of the fugitive disentitlement doctrine.

Amicus the Mexican Institute of Cinematography (IMCINE) is an agency of the Mexican Government, through the National Council for the Culture and the Arts (CONACULTA), with responsibility for the protection and promotion of the nation's domestic movie industry and the distribution of Mexican films internationally. *Amicus* La Asociación de Productores y Distribuidores de Películas Mexicanas is the most prominent motion picture association in Mexico and, among other things, addresses film distribution rights in Mexico. For each of the thirty-four films in dispute in this case, it has issued a certificate that identifies the estate of Mario Moreno Reyes – also known as Cantinflas – as the owner of those distribution rights.

In addition to the interests of the Mexican Government outlined above, all *amici* have an interest in this action because petitioner was held in contempt and subsequently deemed a fugitive when he refused to withdraw the Mexican copyrights of, and turn over the original film negatives for, motion pictures produced by and starring Cantinflas, who was petitioner's father and is widely acclaimed as one of Mexico's most beloved cinematic and cultural figures. Because the films at issue constitute a very important part of Mexico's acclaimed film history and Mexico's cultural patrimony, this dispute is a subject of significant concern to all *amici*.

STATEMENT

This is a case in which a permanent Mexican national was deemed a "fugitive" from U.S. law when he declined to travel to the United States to surrender to an arrest warrant issued by a federal district court for conduct that occurred in Mexico and was indisputably legal there. Moreover, the arrest warrant in question was issued not because respondent had been prejudiced by petitioner's conduct, but instead for the express purpose of precipitating the dismissal of his appeal pursuant to the fugitive disentitlement doctrine.

Application of that doctrine to cases such as petitioner's substantially undercuts the rights of Mexican nationals, including by potentially eliminating their rights to appeal in cases in which they dispute the issuing court's jurisdiction. This Court should thus review the judgment below in the exercise of its supervisory authority over the federal courts to ensure the uniform and consistent application of the fugitive disentitlement doctrine's narrow exception to the statutory right to appeal.

I. The 1993 Interpleader Action Producing the Stipulated Judgment

1. Petitioner Mario Moreno Ivanova is a citizen of Mexico and has long resided in Mexico City with his family. He is the son and executor of the estate of Mario Moreno Reyes, who – under his stage name, "Cantinflas" – was an international film star in the Spanish-speaking world. Between 1940 and 1981, Cantinflas starred in and produced approximately fifty motion pictures and gained renown as one of Mexico's most important cultural figures.

2. Respondent Columbia Pictures Industries, Inc. was the longtime distributor of the Cantinflas films. In August 1993, after Cantinflas's death, respondent filed an interpleader action in the U.S. District Court for the Central District of California in which it sought to resolve allegedly conflicting claims to the producer's share of the proceeds (also known as "participations") from its distribution of the Cantinflas films. Pet. 5. Among the defendants in the interpleader action were petitioner and Eduardo Moreno Laparade, who was Cantinflas's nephew.

In 1994, petitioner voluntarily appeared in the interpleader action for the limited purpose of allowing the parties to enter into a settlement agreement, known as the "Stipulated Judgment." The Stipulated Judgment provided that respondent could continue to distribute the Cantinflas films to the extent that it had rights under various distribution contracts, and that participations due under those contracts

would be distributed according to specified percentages. Because both Laparade and petitioner claimed rights to the same interest in the films, the Stipulated Judgment provided that those participations would be paid into escrow pending the resolution of a case filed by Laparade in Mexico seeking a declaration that he, rather than the Cantinflas estate, owned the copyrights to the films. Pet. App. 60a.

In executing the Stipulated Judgment, petitioner made clear that the settlement agreement would provide future jurisdiction in U.S. courts only on a very narrow basis. That document expressly provides that petitioner:

> hereby appear[s] specially and solely for the limited purpose of giving jurisdiction to this Court to enter judgment pursuant to the terms of this stipulation ("the Judgment") and for the enforcement of this stipulation and the Judgment.

Pet. 5-6 n.1.

II. The 1997 Litigation

1. In June 1996, the estate prevailed against Laparade in the Mexican ownership case referenced in the Stipulated Judgment and, through further proceedings in Mexico, was deemed to own the copyrights in all thirty-four films in dispute. Pet. 5.

In 1997, Laparade filed a new complaint in Los Angeles against both respondent and petitioner, once again seeking a declaration that he "was the sole owner of all right, title and interest in and to the" Cantinflas films. The new complaint relied on the 1994 Stipulated Judgment as the basis for jurisdiction. See First Am. Compl. ¶¶ 1, 14, No. CV 97-0615 WJR (Apr. 11, 1997).

Petitioner promptly sought dismissal of the new complaint. He explained that although the Stipulated Judgment authorized the district court to determine whether the judgment in petitioner's favor in his dispute with Laparade had been finally and conclusively resolved by the Mexican court, such that petitioner would be entitled to the

participations placed in escrow pursuant to the Stipulated Judgment, "[n]othing in the Stipulated Judgment permits the Court to determine the substantive issue of whether Laparade has any *rights* to the Films." Petr. Mot. Dismiss 2-3, 10-11, No. CV 97-0615 WJR (Apr. 4, 1997) (emphasis added).

Respondent filed an answer in which it too argued that Laparade's ownership claims fell outside the purview of the jurisdiction retained by the court pursuant to the Stipulated Judgment. Respondent emphasized that aside from the issue of who was entitled to the participations, "the Interpleader Judgment resolved all claims regarding the current and future Motion Picture Proceeds which were generated by [respondent's] exercise of its rights, under copyright and otherwise, to distribute the Motion Pictures." Resp. Answer to Am. Compl., Countercl., and Cross-cl. for Interpleader [hereinafter "Answer & Interpleader"] ¶ 41, No. CV 97-0615 WJR (Apr. 28, 1997).

2. Respondent also filed an entirely new interpleader action as a counterclaim and cross-claim to Laparade's complaint. The interpleader gave rise to the present controversy. Purporting to rely for subject matter jurisdiction on the Stipulated Judgment, 28 U.S.C. 1335, and/or 28 U.S.C. 1367(a), respondent sought a declaratory judgment that resolved the ownership and distribution rights to the Cantinflas films. Although the copyright ownership rights for the Cantinflas films (which in this action respondent would claim for itself) were not at issue in the Stipulated Judgment, respondent effectively sought to bootstrap its counter- and cross-claims to that agreement, asserting that the Stipulated Judgment was arguably based on its ownership of the Cantinflas films, such that the judgment in the Mexican ownership case was "inconsistent with the terms of the" Stipulated Judgment. Answer & Interpleader 13-14.

Petitioner moved to dismiss respondent's interpleader complaint. As with Laparade's suit, petitioner explained that the district court lacked subject matter jurisdiction over

respondent's new counter- and cross-claims because they too were not covered by the Stipulated Judgment. See Petr. Mot. Dismiss 2, No. CV 97-0615 WJR (Apr. 25, 1997).

In July 1997, the district court ruled that Laparade's ownership claims should be dismissed – because the Mexican courts had "clearly reached a final and nonappealable decision" against him – and that the Stipulated Judgment did not provide a jurisdictional basis for those claims. Pet. App. 65a-67a. However, the court permitted respondent's cross- and counterclaims to go forward, agreeing with respondent that "the Stipulated Judgment was at least arguably premised upon the notion that [respondent] owned the rights to the subject films." *Id.* 70a.

The district court modified its ruling one month later, staying all of the claims and counterclaims pending proof of a final disposition of the dispute between Laparade and petitioner over the ownership of the copyrights to the Cantinflas films. Order Staying Action Pending Final Disposition of Related Matter in Mexican Cts., No. CV 97-0615 WJR (Aug. 28, 1997). Pursuant to that order, and although that very issue had already been resolved by the Mexican courts, Laparade again filed a suit in Mexico seeking a declaration that he owned the copyrights in the films. Respondent filed a counterclaim in that litigation, seeking a declaration that, through various unspecified contracts, it had acquired the copyrights at issue. Resp. Countercl., Mex. Fed. Dist. Ct. Case 19/98, Sec. A (July 8, 1998).

3. In 2000 and 2001, the district court issued a series of extraterritorial preliminary injunctions. First, at respondent's request, in May 2000 it enjoined the ongoing Mexican ownership proceedings that Laparade had, pursuant to the court's August 1997 order, commenced. Pet. App. 54a. The court hypothesized that "[i]f the Mexican proceedings result in a judgment naming either [petitioner] or Laparade as the sole owner of all rights in the Cantinflas films, it could invalidate the Stipulated Judgment, thereby undermining the

Court's jurisdiction over this action and extinguishing [other] interests * * * that were established by the Stipulated Judgment." *Id.* 55a. In 2001, the district court issued two additional extraterritorial injunctions directed at Mexico: (1) a July 31 preliminary injunction that prohibited petitioner from exploiting eight of his father's films anywhere in the world, Pet. 13; and (2) a November 20 preliminary injunction that prohibited petitioner from distributing the remaining twenty-six films anywhere in the world, Pet. App. 30a.

4. In February and March 2002, the district court held a trial on respondent's cross- and counterclaims. All arguments regarding Mexican copyright law were excluded from the trial. See Order re Mot. in Limine, No. CV 97-0615 WJR (Mar. 13, 2001). Moreover, when petitioner brought several of the original film negatives to the trial in an effort to prove his ownership of the films, the district court granted respondent's request that the negatives – which are considered to be an important part of Mexico's cultural heritage, see Pet. 15 – be confiscated as respondent's property, *id.* 15 n.6, and ordered respondent to pay merely a one-dollar bond in conjunction with the confiscation, see Pet. App. 27a.

In June 2002, the district court entered its Findings of Fact and Conclusions of Law. Pet. App. 11a-28a. The court disposed of the dispute over the thirty-four Cantinflas films at issue in two parts.

First, it addressed the dispute over twenty-six Cantinflas films for which respondent claimed complete ownership and distribution rights. Relying in part on an unsigned loan guarantee dated March 10, 1960, the district court declared respondent "to be the owner of all rights, title and interest in" the twenty-six pictures and found, by contrast, that petitioner "holds no ownership interest" in the pictures. Pet. App. 26a ¶ 1. Based on that finding, the court ordered petitioner to deliver to respondent from Mexico the film negatives for any of the twenty-six pictures in his possession. *Id.* 27a ¶ 5.

The district court then turned to eight additional Cantinflas films, in which respondent had never asserted any ownership rights. Instead, respondent initially sought only a declaration that it was owed certain rights of first refusal by the estate. See Pet. 13. Pursuant to a request made by respondent in its post-trial brief, see Resp. Phase II Post-Trial Br. 17-18, No. CV 97-0615 WJR (Apr. 10, 2002), however, the court instead found that petitioner had not established any rights in the eight pictures and thus permanently enjoined him from distributing those pictures. Pet. App. 26a-27a. The court also ordered petitioner to relinquish to a U.S.-based film laboratory any film negatives that he possessed for the eight pictures. *Id.* 27a.

Significantly, and despite respondent's admission at trial that petitioner owns both the Mexican copyrights to all of the Cantinflas films at issue and the exclusive right to distribute those films in Mexico, see Mem. Supp. Mot. for Order Granting New Trial 3, No. CV 97-0615 WJR (June 24, 2002) (citing trial transcript), the district court also continued its extraterritorial injunction, as it "permanently enjoin[ed] [petitioner] * * * from * * * distributing, marketing, offering for distribution or sale, or otherwise exploiting or benefiting from any of the 34 Motion Pictures" anywhere in the world, *including Mexico*, Pet. App. 27a ¶ 4.

In September 2002, in response to petitioner's post-trial motions, the district court stayed its June 2002 order requiring petitioner to turn over the original negatives. Rev. Order re Mot. for Order Granting New Trial 1-2, No. CV 97-0615 WJR (Sept. 10, 2002).

The district court entered its final judgment on January 28, 2003. Petitioner appealed.

In February 2003, petitioner moved forward with his plans to distribute in Mexico two motion pictures for which he holds the Mexican copyrights and all relevant licenses. Both pictures were among the eight as to which respondent had only claimed rights of first refusal. Despite the district

court's express finding that respondent had not established any rights to those pictures, respondent nonetheless filed a motion asking the district court to hold petitioner in contempt. In its order granting the motion, the district court explicitly acknowledged that petitioner's plans did not prejudice respondent in any way, but explained that "the absence of prejudice * * * does not excuse [petitioner's] failure to comply with this Court's order." Order Granting Resp. Mot. for Order Holding Petr. in Civ. Contempt 5, No. CV 97-0615 WJR (Apr. 11, 2003). As a further sanction for petitioner's distribution of the two films, the district court lifted its September 2002 stay order, thereby ordering petitioner to turn over all of the film negatives in his possession. *Id.* 6.

On April 16, 2003, petitioner filed a declaration in which he indicated that he intended to distribute some of the eight pictures in Mexico on DVD. Decl. of Petr. 1, No. CV 97-0615 WJR (Apr. 16, 2003). Petitioner further averred that he had decided to distribute those pictures only after confirming with both his Mexican counsel and the Mexican copyright office that the distribution was entirely legal under Mexican law. *Id.* 2-3. Although in the same declaration petitioner assured the court that he was not distributing any of the other twenty-six pictures anywhere, *id.* 2, the district court held petitioner in contempt and ordered him to pay fines of ten dollars per day for each of the thirty-four films at issue, with the fines increasing by ten dollars per film every seven days, see Order Granting Resp. Mot. for Order Holding Petr. in Civ. Contempt 6, No. CV 97-0615 WJR (Apr. 28, 2003); Pet. 15. Those fines now total well over ten million dollars.

Beginning in April 2003, respondent filed a series of motions in which, relying on the contempt orders, it asked the district court to issue a warrant for petitioner's arrest. In those motions, respondent also suggested that if such a warrant were issued and petitioner did not surrender to U.S. authorities to be incarcerated, the fugitive disentitlement doctrine could be invoked to dismiss his appeal. On July 11, 2003, the district court issued a warrant for petitioner's arrest.

Pet. App. H. The court was well aware that petitioner would not comply with the warrant, as it specifically stated that petitioner "lives in Mexico and is not likely to present himself to a U.S. Marshal for arrest." Pet. 15-16. The court in fact intended petitioner's overseas residency to lead to the dismissal of his appeal: "[I]f [petitioner] refuses to present himself for incarceration, under the 'fugitive disentitlement' doctrine the Ninth Circuit may dismiss the now-pending appeal from this Court's Judgment." *Id.* 16.

6. In February 2003, petitioner filed a complaint against respondent in the same district. Pet. 16-17. This action was necessary both because respondent had failed to pay participations owed to the estate under the Stipulated Judgment for its distribution of the twenty-six Cantinflas films and because the district court had specifically declined in the earlier suit to reach the issue of the Mexican copyrights for the films – which, petitioner alleged, respondent was infringing. Respondent filed a counterclaim, see Pet. 17-18 & n.7, in which it contended, *inter alia*, that petitioner had infringed on its common-law rights in the twenty-six pictures in which respondent had previously been deemed to have ownership rights. Because the district judge who had considered the earlier proceeding had taken senior status and had declined to add petitioner's action to his docket, the case was assigned to a new judge. Transfer Order, No. CV-03-01033-DT (Feb. 25, 2003).

When petitioner's trial counsel missed a scheduling conference, the court immediately entered judgment against petitioner and in favor of respondent on its counterclaims. Pet. 17-18. In addition to a $25 million judgment, respondent was also awarded all of the funds – intended to be paid to the prevailing party in the Mexican copyright litigation – in the escrow account established pursuant to the Stipulated Judgment; petitioner's Mexican copyrights for the Cantinflas films as a sanction for his counsel's failure to appear; and an injunctive order requiring petitioner to withdraw all of the U.S. and Mexican copyrights that he held. *Id.* 17.

Significantly, the district court ordered this transfer of the Mexican copyrights despite (1) respondent's earlier acknowledgement that petitioner properly held such copyrights; (2) respondent's express representation that the district court's June 2002 findings of fact had not decided the issue of the Mexican copyrights; and (3) petitioner's possession of certificates reflecting the estate's sole ownership of the Mexican copyright and distribution rights. Petitioner appealed that ruling.

In June 2004, after petitioner had withdrawn the U.S. copyrights but declined to withdraw his Mexican copyright registrations, the court also issued an arrest warrant as a civil contempt sanction that, as the court specifically noted, was intended "to allow [respondent] to assert the fugitive disentitlement doctrine with respect to the appeal." Pet. 18.

7. The Ninth Circuit consolidated petitioner's appeals. Explaining only that petitioner – who had remained in Mexico throughout the appeal – "ha[d] refused to abide by the district court's orders, and ha[d] refused to surrender to the warrants issued for his arrest," the court of appeals followed the suggestion of both district courts and dismissed the appeals based on the fugitive disentitlement doctrine. Pet. App. 7a.

ARGUMENT

Amici submit that certiorari is warranted because the decision below is an unnecessary invitation to friction between the United States and foreign nations. If the Ninth Circuit's decision is allowed to stand, it will allow foreign citizens living abroad to be drawn into litigation in U.S. courts against their will, even when jurisdiction is at best attenuated, without the right to appeal guaranteed by U.S. law. If, as in this case, an adverse judgment enjoining extraterritorial conduct that is legal where it occurs is entered against those foreign nationals over their objections, the unsuccessful defendants will then face the Hobson's choice between complying with the improper injunctions to ensure

that their appeals are considered on the merits or continuing the conduct at issue but risking dismissal of their appeals. Such a scenario is both a blueprint for plaintiffs who wish to secure an appeal-proof judgment against foreign nationals living abroad and a recipe for conflict between sovereigns. Moreover, in today's interdependent world, such a scenario is increasingly likely to recur. Between the United States and Mexico, for example, there is nearly $250 billion in trade annually. See Office of the U.S. Trade Rep., *NAFTA: A Decade Of Success*, *available at* http://www.ustr.gov/Document_Library/Fact_Sheets/2004/NAFTA_A_Decade_of_Success.html (visited May 9, 2005). The volume of litigation involving that extensive commerce, and cases involving foreign nationals generally, is already substantial and sure to continue to grow.

I. Foreign Nationals Such as Petitioner Have the Right to Appellate Review.

Amici submit that certiorari is warranted because the decision below effectively precludes appellate review of adverse judgments against foreign nationals who dispute a U.S. court's jurisdiction to consider a case and therefore decline to comply with the court's order.

In this case, petitioner is a Mexican national who contested both the district court's jurisdiction to consider the interpleader action in which he was a defendant and the merits of the court's decision awarding respondent worldwide ownership rights in the Cantinflas films. It is uncontestable that 28 U.S.C. 1291 – which states, in relevant part, that "[t]he courts of appeals * * * shall have jurisdiction of appeals from *all* final decisions of the district courts of the United States" (emphasis added) – provides Mexican nationals with a right to appeal. To be sure, the fugitive disentitlement doctrine is a narrow judicially created exception to that right, but that doctrine is both inapposite here and, as this Court has recognized, intended to be invoked rarely and only in unusual circumstances. See *infra* Part II.

In the view of *amici*, nothing else in the statute creates an exception that, as in petitioner's case, precludes a party who is the subject of a civil contempt order from bringing an appeal challenging the district court's very jurisdiction over the proceeding at issue. To the contrary, *amici* note that in *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 73-74 (1988), the petitioners had been held in civil contempt after they had repeatedly declined to comply with subpoenas issued by a federal district court on the ground that the court lacked subject matter jurisdiction. This Court expressly held that petitioners had a right to attack the contempt order "by asserting that the issuing court lacks jurisdiction over the case." 487 U.S. at 76.

Moreover, although the inherent power of federal courts to punish contempt is well-established, see *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 44 (1991), the district courts' actions in this case represent a significant and unwarranted extension of those powers. Although this Court has recognized that the "outright dismissal of a lawsuit * * * is a particularly severe sanction, yet is within the court's discretion," see *id.* at 45, this Court's precedents also envision that appellate review will be available for review of such sanctions, see *Link* v. *Wabash R.R. Co.*, 370 U.S. 626, 630 (1962) (considering sua sponte dismissal, pursuant to court's inherent powers, of petitioner's case). The decision below approves severe sanctions for contempt while simultaneously removing the court of appeals from its essential, traditional role as a check on erroneous district court rulings. Indeed, other courts of appeals not only acknowledge that "appellate review is available to litigants who are cited for contempt," see *Federal Ins. Co.* v. *Maine Yankee Atomic Power Co.*, 311 F.3d 79, 81 (CA1 2002), but regularly require a litigant who fails to comply with a district court's order to be held in contempt precisely to appeal that adverse ruling, see *Olson* v. *United States*, 872 F.2d 820, 821 (CA8 1989).

Even if the fugitive disentitlement doctrine could, in some circumstances, be properly invoked to dismiss an appeal

arising out of a failure to comply with a civil contempt order, it would certainly not be appropriate in a case such as petitioner's, as there is no authority for a district court to order the arrest of a foreign national, fully cognizant that the foreign national resides abroad and thus will not present himself to be incarcerated, for the specific purpose of obviating the foreign national's ability to appeal. Such an order would effectively allow the district court to insulate its decisions (and in particular those involving foreign nationals) from review, which the courts are not empowered to do.

Finally, while *amici* contend that the invocation of the fugitive disentitlement doctrine to preclude review of an appeal by a foreign national who lives abroad and contests the court's subject matter jurisdiction would be undesirable as a general matter, it is particularly inappropriate in petitioner's case because the district courts' underlying rulings constitute a serious intrusion upon the sovereignty of Mexican law. Neither district court considered Mexican copyright law, which clearly indicates that *petitioner* owns both the Mexican copyrights and distribution rights for the films at issue. Indeed, petitioner possesses certificates that specifically reflect his ownership of the films. And even if respondent wished to challenge petitioner's ownership of those rights, Mexican law requires that such a challenge take place in Mexico pursuant to Mexican law, with the Mexican copyright office joined as a party to the proceeding. Mex. Fed. Law of Author's Rts. arts. 213 & 214 (1996). The district courts' disregard for both this well-established framework for resolving disputes over the ownership of Mexican copyrights and the evidence of petitioner's ownership of those rights is, in the view of *amici*, an affront to Mexico.

II. Certiorari Is Warranted Because the Fugitive Disentitlement Doctrine Was Improperly Applied to Petitioner's Case.

A. Petitioner Cannot Be Deemed a Fugitive.

The ruling below is a matter of serious concern for *amici* because it creates the very real prospect that U.S. courts will classify other foreign nationals who challenge the court's subject matter jurisdiction as "fugitives" merely because they live abroad and, if they fail to comply with every aspect of a court order, decline to travel to the United States to face incarceration – even when they can in no way be described as having "fled" the United States.

Throughout these proceedings, petitioner has been a citizen and resident of Mexico. He has neither an office nor a residence in the United States. Despite petitioner's lack of contacts with the United States, he was nonetheless haled into court by respondent in 1993 and, to settle that action, agreed to the Stipulated Judgment, which specified how the participations would be divided. Pet. 5-6 & n.1. Despite the Stipulated Judgment's extremely narrow jurisdictional provision, petitioner was – over his repeated objections – then subjected to an adverse judgment that stripped him of all rights to the films themselves, anywhere in the world. When petitioner refused to comply with selected portions of the court's order and instead conducted business in Mexico that was indisputably legal there, the district court issued a warrant for petitioner's arrest for the express purpose of rendering him a "fugitive" and thereby precluding his appeal.

Amici have been unable to locate a single case in which the fugitive disentitlement doctrine has been invoked in circumstances even remotely analogous to those present here. Indeed, when confronted with civil defendants who had resided outside the United States throughout the proceedings at issue, at least two courts of appeals have expressly declined to deem those defendants fugitives. See *Motorola Credit Corp.* v. *Uzan*, 115 Fed. Appx. 473, 474-75 (CA2 Oct. 22,

2004) (denying motion to dismiss appeal on fugitive disentitlement grounds and explaining that individual defendants "have resided in a foreign country all along, and were only 'present' in the Southern District in the barest sense necessary to support personal jurisdiction. Although there is no *per se* rule against dismissing the appeal of a nonresident, we believe that a nonresident who appeals an adverse judgment is in a different position than the typical fugitive who leaves a jurisdiction for the sole purpose of evading a judgment."); *March* v. *Levine*, 249 F.3d 462, 469-70 (CA6 2001) (noting that U.S. defendant living in Mexico was "arguably not a fugitive given that the [contempt] orders were entered against him *after* he moved to Mexico"), cert. denied, 534 U.S. 1080 (2002).[2]

Although the absence of analogous cases might in some circumstances carry little weight, the fact that other courts have not applied the fugitive disentitlement doctrine to similar cases must carry enormous significance here in light of the myriad cases brought in U.S. courts against foreign nationals who contest U.S. jurisdiction. Moreover, the dearth of opinions discussing the question is not surprising because – despite the undeniable significance of the issue – courts of appeals regularly dispose of the fugitive disentitlement issue with only a perfunctory discussion, and often on motions panels. See, *e.g.*, *Uzan*, 15 Fed. Appx. at 474-75; *SEC* v. *Winburn*, Nos. 98-5183 & 98-5235, 1999 U.S. App. LEXIS 4001 (CADC Feb. 3, 1999) (per curiam) (granting motion to dismiss on fugitive disentitlement grounds); *Caesars World*,

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[2] By contrast, in *United States* v. *Barnette*, 129 F.3d 1179, 1182 (1997), the Eleventh Circuit applied the fugitive disentitlement doctrine to dismiss the appeal of a former U.S. citizen who had renounced her citizenship and moved overseas after the government filed its petition to hold her in contempt. The court specifically emphasized that the appellant had "remained a resident of Jacksonville, Florida" and paid U.S. taxes throughout most of the proceedings at issue. *Ibid.*

Inc. v. *Milanian*, Nos. 03-16063 & 03-16685, 2005 U.S. App. LEXIS 1533, at *6 n.1 (CA9 Feb. 1, 2005) (mem.) (denying motion to dismiss based on fugitive disentitlement doctrine). Nor has this Court definitively resolved whether the mere fact that a party to a proceeding resides overseas automatically renders him a fugitive or whether a district court can issue an arrest warrant for the express purpose of precluding an appeal. As we discuss in the next section, this Court's precedents strongly suggest that both questions should be answered in the negative. But, in any event, both questions cry out for resolution by this Court in the exercise of its supervisory authority over the U.S. judiciary.

B. Dismissal of Petitioner's Appeal Does Not Serve Any of the Purposes of the Fugitive Disentitlement Doctrine.

The dismissal of petitioner's appeal pursuant to the fugitive disentitlement doctrine is also a matter of significant concern to *amici* because it is neither reasonable nor consistent with any of the purposes that the fugitive disentitlement doctrine is intended to serve. In *Degen* v. *United States*, 517 U.S. 820 (1996), this Court considered whether to extend the fugitive disentitlement doctrine to permit the entry of a civil forfeiture judgment against a claimant with dual U.S.-Swiss citizenship who left the United States for Switzerland before he was indicted on drug trafficking and money laundering charges. See *id.* at 821-22. This Court began by emphasizing the need for caution in invoking the fugitive disentitlement doctrine, explaining that although courts "have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities," "[p]rinciples of deference counsel restraint in resorting to inherent power and require its use to be a reasonable response to the problems and needs that provoke it." *Id.* at 823-24 (internal citations omitted).

In *Degen*, this Court concluded that the application of the fugitive disentitlement doctrine to bar the petitioner's appeal

was inappropriate because "disentitlement is too blunt an instrument for advancing" any of the purposes that may have been served by the doctrine. 517 U.S. at 828. The same is true here. Petitioner is a foreign national, residing abroad, who was haled into a U.S. court in the 1993 interpleader action that resulted in the Stipulated Judgment – which provided for a distribution of the *participations* for the Cantinflas films. Over petitioner's objection, the district court nonetheless bootstrapped respondent's claims regarding *worldwide ownership* of the Cantinflas film rights to the very limited jurisdictional provision in the Stipulated Judgment, awarded respondent ownership and distribution rights in twenty-six of the films at issue, and – despite respondent's concession that petitioner held the Mexican copyright and distribution rights – prohibited petitioner from distributing the films anywhere in the world. Then, although petitioner's failure to turn over the film negatives did not prejudice respondent (including because respondent itself effectively regarded them as worthless), and although petitioner sought to distribute only two films, in which respondent did not have any rights, and then only in Mexico, the district court issued a warrant for petitioner's arrest for the express purpose of making him a fugitive and precluding consideration of his appeal on the merits. In such circumstances, the invocation of the fugitive disentitlement doctrine erodes, rather than enhances, the respect accorded the judgments of the lower courts. See *Degen*, 517 U.S. at 828; see also *FDIC* v. *Pharaon*, 178 F.3d 1159, 1163 (CA11 1999) (declining to apply fugitive disentitlement doctrine to strike foreign national's answer to civil complaint despite his failure to appear in criminal case and concluding that "[i]f such application of the doctrine were permitted, virtually anyone might be able to obtain a judgment against a fugitive simply by filing a claim and moving for judgment based on the fugitive disentitlement doctrine. Such judgments likely would be viewed with much skepticism.").

In declining to extend the fugitive disentitlement doctrine to bar Degen's appeal, this Court further reasoned that none of the rationales for the invocation of that doctrine applied to petitioner. *Amici* submit that those rationales are similarly absent in petitioner's case.

As this Court explained in *Degen*, disentitlement serves a deterrent effect by "discourag[ing] the felony of escape and encourag[ing] voluntary surrenders." *Degen*, 517 U.S. at 824. Any deterrent effect of applying the fugitive disentitlement doctrine to an appellant, such as petitioner, who did not "escape" from criminal proceedings but instead merely remained abroad can at best be negligible. This negligible effect is borne out by the district court's statements that it did not expect the warrant for petitioner's arrest to have any effect, Pet. 15-16, and that it was deeming petitioner a fugitive so that the court of appeals could invoke the fugitive disentitlement doctrine.

Next, the Court explained, the earliest rationale for the Court's invocation of the doctrine, in *Smith* v. *United States*, 94 U.S. 97, 97 (1876), was that "so long as the party cannot be found, the judgment on review may be impossible to enforce." *Degen*, 517 U.S. at 824. The Court in *Degen* contrasted such a scenario from the one before it, explaining that because "the court's jurisdiction over the property [at issue was] secure despite Degen's absence, there is no danger the court in the forfeiture suit will waste its time rendering a judgment unenforceable in practice." *Id.* at 825. Similarly, most of the judgment against petitioner was enforceable despite his absence: the district court's docket reflects that in August 2002, the funds – totaling nearly five million dollars – that respondent had deposited into the interpleader account were returned to it. The need to enforce the portion of the judgment requiring petitioner to turn over the film negatives is at best minimal when respondent itself has admitted both that "original film negatives have no more than emotional and sentimental value" and that "[it] has more than sufficient film elements to" distribute any of the films at issue. Mot. for

Order Granting New Trial 19-20, No. CV 97-0615 WJR (June 24, 2002).

This Court has further held that disentitlement "promotes the efficient, dignified operation of the courts." *Degen*, 517 U.S. at 824 (internal quotation marks omitted). In *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 244 (1993), in which this Court declined to extend the fugitive entitlement doctrine to a criminal defendant who fled before sentencing but was apprehended before filing his appeal, the Court noted that although the petitioner's flight had delayed proceedings in the district court, his appellate proceedings remained "unaffected by petitioner's flight." 507 U.S. at 245 n.16. Here, too, the "efficient, dignified operation" of the court of appeals was unimpeded by petitioner's status as a "fugitive": although petitioner declined to comply with the district court's rulings and was deemed a fugitive while his case was on appeal, his case was nonetheless fully and expeditiously briefed and argued.

Finally, the fourth rationale cited by this Court is the "need to redress the indignity visited upon the" district court by the defendant's absence. *Degen*, 517 U.S. at 828. In petitioner's case, however, the district court can claim no such "indignity" when it manufactured petitioner's fugitive status precisely to trigger the fugitive disentitlement doctrine and most aspects of its judgment are enforceable even in petitioner's absence.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition, certiorari should be granted.

Respectfully submitted,

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May 16, 2005